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DEPARTMENT OF DEFENSE SUBCONTRACTOR KICKBACKS: INDUSTRY PERSONNEL PRACTICES

HEARING

BEFORE THE

SUBCOMMITTEE ON
OVERSIGHT OF GOVERNMENT MANAGEMENT

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

NINETY-NINTH CONGRESS

SECOND SESSION

JUNE 11, 1986

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DEPARTMENT OF DEFENSE SUBCONTRACTOR KICKBACKS: INDUSTRY PERSONNEL PRACTICES

WEDNESDAY, JUNE 11, 1986

U.S. SENATE,
SUBCOMMITTEE ON OVERSIGHT
OF GOVERNMENT MANAGEMENT,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, DC.

The subcommittee met, at 9:30 a.m., in room 342 of the Dirksen Senate Office Building, Hon. William S. Cohen (chairman of the subcommittee) presiding.

Present: Senators Cohen and Levin.

Staff present: Susan M. Collins, staff director; Jeffrey A. Minsky, staff investigator; Linda J. Gustitus, minority staff director and chief counsel to the minority; Elise J. Bean, minority counsel; Frankie de Vergie, chief clerk; and Eve Bennet and Tony Feldstein, interns.

OPENING STATEMENT OF SENATOR COHEN

Senator COHEN. Good morning, ladies and gentlemen.

This morning the Subcommittee on Oversight of Government Management continues its probe into the nationwide scandal of subcontractor kickbacks in the defense industry.

Our focus today will be on the ability of corrupt buyers to find new jobs in the defense industry, despite having been fired or asked to resign because of known or suspected involvement in kickbacks.

Earlier this year, the subcommittee held a hearing which revealed the prevalence of kickbacks in defense subcontracting. The testimony confirmed our worst fear that kickbacks aren't the exception, but rather the rule across the country.

In perhaps the most startling statement at the hearing, Robert Bonner, the U.S. attorney for the Central District of California, estimated that up to 50 percent of the buyers or frontline procurement personnel of prime contractors take kickbacks in return for issuing subcontracts in southern California.

Subcontractor kickbacks, however, are by no means restricted to the west coast. Federal indictments for kickback activities have recently been handed down in New Jersey, Massachusetts, and South Carolina. Moreover, according to the U.S. attorney for the Eastern District of Louisiana, kickbacks were a way of life at a New Orleans shipyard, where 26 employees and suppliers have been indicted over the past 2 years.

The list of companies which have had employees either indicted or convicted for subcontractor kickbacks violations reads like a veritable "who's who" of Fortune 500 companies, including Hughes Aircraft, Northrop, General Electric, Raytheon, TRW, and Teledyne. Kickbacks have been uncovered in contracts involving major weapons systems, including contracts for the stealth bomber, the A-6 aircraft, the M-1 tank, and laser targeting systems.

As a followup to our earlier hearing, today the subcommittee is going to consider the extent to which inadequate personnel practices of defense prime contractors contribute to the kickback problem. Specifically, we will focus on purchasing agents for prime contractors who, under suspicion of taking kickbacks, are either fired or permitted to resign from one company and are subsequently reemployed in procurement departments of other companies. The risk, of course, is that they will resume their illegal business practices.

The purposes of this hearing are, first, to illustrate through the use of case studies that current industry personnel practices may actually facilitate the movement of corrupt buyers.

Second, to discuss the legal constraints that prime contractors face in trying to deal with the problem.

And, third, to explore the changes in industry personnel practices which could impede the flow of dishonest buyers from company to company.

Even though prime contractors are, more often than not, the victims of corrupt employees, the primes generally have been reluctant to confront kickback problems because of bad publicity and possible adverse consequences. In the past, prime contractors often handled allegations of kickbacks quietly by simply firing the individuals involved or allowing them to resign without notifying law enforcement authorities. By sweeping the problem under the rug, the company avoided the stigma of a Federal investigation.

More recently, many defense contractors have done a much better job of reporting allegations to Federal law enforcement officials and have cooperated fully with subsequent investigations. While prime contractors are being more forthcoming with the Federal authorities, they remain, however, extremely cautious about sharing their suspicions about corrupt buyers with other prime contractors.

Consequently, even employees who are fired and are the subject of Federal investigations are hired by other unwitting defense contractors. According to a company vice president of Hughes Aircraft, for example, "several buyers who quit jobs with Hughes under a cloud of suspicion were readily able to secure employment elsewhere in the aerospace industry."

For the past 3 months, the subcommittee has traced the employment histories of 25 buyers and other defense industry officials who have been convicted or strongly suspected of taking kickbacks during the past 5 years.

The subcommittee's investigation shows that corrupt buyers moved to new jobs with surprising facility. Moreover, many of these employees had security clearances, which I note, to Senator Levin and myself, raises disturbing questions about their vulnerability to bribes from foreign agents.

The results of the subcommittee's investigation will be discussed in greater detail by our first witness.

This morning we're going to examine two case studies that are particularly illustrative of the problem. Both persons will be referred to by pseudonyms in order to protect their privacy.

In one case, a "Mr. Brown" had worked in procurement jobs in the defense industry for over 20 years. He resigned from his position as procurement administrator at Northrop while under grand jury investigation for alleged kickback violations, and he was subsequently hired by TRW. TRW officials apparently were completely unaware of the serious allegations against Mr. Brown when they hired him. Mr. Brown was later fired by TRW after he pled guilty to accepting a $4,000 bribe. He is now in prison.

The second case, a "Mr. White," also involves a 20-year procurement veteran in the defense industry. Despite strong evidence that he had been taking kickbacks at Garrett—5 to 10 percent on orders placed by some vendors, he was able to get a job at Northrop, where he is currently employed.

How are corrupt buyers able to move from company to company? As a general rule, we found that defense contractors are reluctant to share with other companies information about former employees who are suspected of taking or soliciting kickbacks. Most defense contractors limit their response to reference inquiries to the corporate equivalent of name, rank, and serial number. Such tightlipped policies facilitate the employees moving to a new prime contractor when confronted with allegations of misconduct.

I want to make an important distinction this morning. Companies should take care that they do not blacklist employees about whom there are only vague rumors of misconduct. But in the examples that we're using as case studies this morning, Mr. Brown and Mr. White, the former employers had strong evidence of wrongdoing, which they did not share with the two subsequent employers. Northrop Corp. knew that Mr. Brown was being investigated by a grand jury. Garrett Corp. had audio tapes implicating Mr. White. So we're not talking about mere rumor, unsubstantiated allegations, or groundless charges, but rather significant evidence of serious wrongdoing that the companies failed to pass on to the prospective employers.

From the company's perspective, disclosing information about a former employee may subject them to liability. Many defense contractors contend that their reluctance to provide more information in reply to reference checks results from their perception of risk of litigation and potential financial liability arising from defamation suits.

A final question, then, is what can be done to remedy this problem? Much of the solution to the problem must come from the defense contractors themselves since it is their personnel practices which contribute to the problem of corrupt buyers going from company to company. Considering that kickbacks are so difficult to detect, it is all the more important that prime contractors take every precaution to ensure that the employees they hire are people of integrity.

The goal, in my judgment, is to balance the need to close the revolving door to corrupt buyers with the need to protect innocent

individuals who may be victims of the company rumor mill. Today's hearings, I hope, will help us take a step toward achieving that balance.

We look forward to hearing from our witnesses this morning, but first I'd like to yield to my colleague, Senator Levin, who initiated the subcommittee's investigation. Senator Levin.

OPENING STATEMENT OF SENATOR LEVIN

Senator LEVIN. Thank you, Senator Cohen, for calling this hearing on a very critical aspect of the subcontractor kickback scandal. You again have shown leadership and initiative in a very important area of legislative concern. As you have said, this is the second hearing of this subcommittee on what we have learned to be a nationwide, longstanding problem: subcontractor kickbacks in the defense industry.

We were all shocked by the assessments that were made at our February hearing that the defense industry is honeycombed with kickback schemes. We also heard about the inadequacies of the current Anti-Kickback Act. In response, we took the step of introducing legislation to strengthen the Anti-Kickback Act to make sure it is a more viable tool for prosecutors to use and a greater deterrent to corruption by buyers for prime contractors in the defense industry.

I would hope that we could mark up that bill in the Governmental Affairs Committee sometime this month.

The issue that we're addressing today is the internal personnel practices of the defense prime contractors and the failure of these practices to protect the companies from hiring individuals who are likely to engage in kickback activity. The subcommittee investigation has identified major gaps in the intracompany documentation and intercompany exchange of information concerning suspected or proven kickback activity by employees. And these gaps allow persons strongly suspected or convicted of kickback activity to move with relative ease from one defense prime contractor to another.

I might add that we have learned that many of these buyers have security clearances, and those clearances may also be unaffected by the suspected kickback activity. We have also learned that these individuals are most often allowed to resign from a company where the kickback allegation surfaced rather than face involuntary termination.

The subcontractor kickback scandal cannot be licked so long as the perpetrators believe, with a degree of confidence, that they won't get caught, and if they do, that the greatest inconvenience they face is the search for a new job with a different employer. The kickback artists have to know that kickback activity won't be tolerated, that polite exits from current employment won't be allowed, and that new jobs in the same field won't come without hard questions from a knowledgeable prospective employer who demands clear answers. In short, they have to know that the revolving door for corrupt buyers has been slammed shut. Today that is not the case.

The testimony we will hear and the documents we have acquired show that prime contractors' personnel practices are sloppy and

that they are clearly inadequate and ineffective. Employment information from prior employers frequently isn't sought, and when sought, frequently isn't provided. Resignations are permitted in lieu of firings. Personnel files are incomplete and misleading. The result is a cozy employment environment for kickback artists, where employers ease corrupt buyers out their back door right into the front door of the next defense prime contractor.

As I said earlier, that confidence of easy reemployment has to be broken and replaced with an acute awareness that as a corrupt buyer, reemployment means having to deal directly with the allegations of the past. To destroy that confidence and establish that awareness, defense prime contractors have to make significant changes in their personnel practices. We'll discuss those changes as the hearing progresses.

Given the breadth of the corruption, it is also necessary and appropriate for the Department of Defense to monitor the personnel practices of the major defense contractors and issue regulations to guarantee adequately protective personnel policies.

We must, of course, keep in mind that there is a balance that we are trying to achieve here, as the chairman indicated. No one wants to encourage or condone blacklisting. An individual is innocent until proven guilty in these situations like everyone else, like anywhere else, and has certain rights of privacy. What we are urging here is the communication of accurate and complete information, so that hiring decisions are made with all the relevant facts, so that a company is not getting a wolf in sheep's clothing. That is what this hearing is about.

In closing, I would like to add that since our February hearing, the defense industry had also taken some steps to stop the kickback scandal. You will recall that at that hearing, much of the testimony by Federal law enforcement personnel was directed at the prime contractors, and their unwillingness or disinterest in aggressively working to stop the kickback scandal.

Well, I am pleased to report that in April of this year, the Aerospace Industry Association, at the behest of Hughes Aircraft Corp., conducted what I think is an unprecedented seminar for member corporations and their subcontractors. The subject of that seminar was the kickback scandal and what the industry could do to stop it. Some 650 employees of defense prime contractors and subcontractors listened to several speakers and panels throughout the day discuss the various aspects of the problem and possible solutions, and, most importantly, tried to drive home the message that kickbacks were not going to be tolerated, that kickbacks are no longer to be viewed as business as usual, as we heard at our February hearing.

The defense prime contractors who we contacted for information relative to today's hearing were also most cooperative. These actions signal a sincere interest on the part of the prime contractors to police themselves and to participate in finding a solution to the problem. And well they should, since they are commonly just as much a victim of these kickback artists as are the taxpayers of the United States.

Again, my thanks, Mr. Chairman. I also look forward to today's testimony.

Senator COHEN. Thank you very much, Senator Levin.

Our first witness this morning is Elise J. Bean, minority counsel of the Oversight Subcommittee. Ms. Bean has been the primary staff person working on the subcommittee's investigation of subcontractor kickbacks and has done an outstanding job. She is here to describe the results of the subcommittee study on the personnel documents of defense contractors who have employed individuals either strongly suspected of or, indeed, known to have taken kickbacks.

Ms. Bean, we will be pleased to hear from you.

TESTIMONY OF ELISE J. BEAN, MINORITY COUNSEL, SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT

Ms. BEAN. Thank you very much. I've submitted a statement for the record so, to save time, I'm going to summarize parts of it and add some new information that came up yesterday after my statement was prepared.[1]

In the course of investigating this issue, the subcommittee contacted a number of defense contractors and collected information on 25 prime contractor employees. Most of these individuals were buyers or supervisors in the procurement departments. For the sake of clarity, I will refer to them just as buyers.

The investigation confirmed the existence of a revolving door for corrupt buyers. By revolving door, I mean a situation in which a buyer, leaving one defense prime contractor under suspicion of wrongdoing, is able to find a new defense procurement position at another defense firm.

The investigation also confirmed that poor industry personnel practices—namely, failure by defense prime contractors to exchange accurate and reliable information about buyers—facilitated these buyers' movements from one company to the next.

I'd like to first describe some of the evidence we gathered on the existence of the buyers' revolving door.

Of the 25 employees we studied, 15 had been convicted of taking kickbacks. The remaining 10 were strongly suspected by their employers but had not been indicted or convicted. At least four of the buyers are currently employed in the defense industry.

We also found that 22 of the 25 suspect buyers possessed at some time confidential, secret, or top secret security clearances from the U.S. Department of Defense.

Of the 25 buyers we studied, we confirmed that more than one-third, or 9 individuals, had left their companies under suspicion of taking kickbacks and found new jobs as buyers with other defense prime contractors. Our information sugggested that an additional five did the same thing, but we chose to focus our attention on the first nine. Of these nine buyers, more than half were caught or strongly suspected of taking kickbacks during their employment with a subsequent defense contractor.

Two of the nine were suspected of taking kickbacks at each of three firms. One individual had been convicted during 1983 for taking kickbacks, yet was able, in 1984, to find another job as a

[1] Ms. Bean's prepared statement is on p. 49.

buyer with a major defense contractor. He resigned that position only after a subcontractor reported him for soliciting kickbacks.

Today's hearing is focusing on two buyers who serve as good examples of the 25 cases the subcommittee staff investigated: "Mr. Brown" and "Mr. White."

To facilitate discussion of these case histories, I would like, at this time, to ask that two sets of documents be placed in the hearing record. The first set of documents relates to Mr. Brown, and they are marked exhibit B-1 through exhibit B-11.[1] The second set contains documents related to Mr. White. The documents are marked exhibit W-1 through W-3.[1]

Senator COHEN. Those documents will be included.

Ms. BEAN. Mr. Brown is a 20-year employee of the defense industry, who has worked for a number of defense prime contractors. In 1984, he was working for Northrop, as a procurement administrator for the Stealth Bomber Program. In September 1984, a grand jury investigating kickbacks served a subpoena on Northrop asking for materials associated with Mr. Brown. Northrop placed Mr. Brown on suspension and initiated its own audit. Two weeks later, Mr. Brown resigned.

Despite the ongoing grand jury and company investigations, and the job suspension, in 2 months, Mr. Brown found a new procurement position with TRW in Colorado. Five months after being hired by TRW, he was indicted for taking kickbacks while at Northrop. On August 26, 1985, he pleaded guilty to the charges and is now serving a 3-year prison sentence.

Mr. White is another 20-year employee of the defense industry. He spent most of his career at the Garrett Corp. compiling glowing job evaluations at every post.

In March 1985, however, Garrett began to suspect that Mr. White, then a buyer, was involved in kickbacks. Garrett eventually obtained audio tapes and a sworn statement implicating Mr. White in kickback schemes with half a dozen subcontractors. Garrett contacted the FBI, which also launched an investigation. Before the investigations were complete, however, the program that Mr. White was working on ended, and he is reported as having been laid off due to program termination.

Within a month after his departure from Garrett, Mr. White landed a job with Northrop Corp. In evaluating his application, Northrop reported to us that they telephoned Garrett's personnel office and security department, on separate occasions, to gather information about Mr. White. But neither department told Northrop what was going on. Northrop says that all it was told was Mr. White's job title, salary, and dates of employment.

Garrett has no record of these calls and has a policy of not providing any information to oral requests. In any event, based upon other favorable recommendations, Northrop decided to hire Mr. White as a senior buyer. Mr. White was thus able to find a new procurement position, despite ongoing investigations raising serious questions about his integrity.

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[1] See pp. 100-113, 114-121 for exhibits.

Approximately 3 months after Mr. White was hired by Northrop, Garrett fired 13 buyers for taking kickbacks. Northrop heard rumors that Mr. White had been involved in the kickback schemes at Garrett. Northrop did not confront Mr. White with these rumors, however, but reviewed his position with the company. Northrop decided to keep him in his present position, but to instruct his supervisor to monitor his actions.

Mr. White remains a buyer at Northrop today.

How does this happen? Do employers knowingly fill their procurement positions with individuals suspected of kickback activity?

The subcommittee investigation indicates that they do not. Instead, major flaws in the industry's personnel practices allow these situations to occur.

Looking again at the examples of Mr. Brown and Mr. White, the inadequacies are apparent.

In Mr. Brown's case, his Northrop separation notice, marked exhibit B–1, says that he quit for personal reasons. It never mentions the job suspension or the grand jury investigation.

The same is true about his resignation letter, marked exhibit B–2. In fact, there is little in Mr. Brown's Northrop personnel file that would alert the reader to the company's suspicions about his misconduct.

Documents that would tell the story, such as exhibits B–3 and B–4, were filed elsewhere, in Northrop's security department.

In searching for a new job, Mr. Brown did not himself disclose his job suspension or the ongoing investigations. To the contrary, in a letter he sent to TRW he stated that he was looking for a new job because he wanted to relocate to a cleaner environment.

TRW's files indicate that it tried to confirm this information, by forwarding a questionnaire to Northrop and by telephoning one of the references provided by Mr. Brown. Northrop did not, however, answer the questions asked. Instead, it sent TRW a computer printout providing Mr. Brown's job title, salary, and dates of employment. The printout did not indicate why he left, or whether he was eligible for rehire, and TRW apparently did not attempt to obtain the missing information.

Thus, TRW failed to learn prior to hiring Mr. Brown about his job suspension, the ongoing FBI, grand jury, and Northrop investigations, and the evidence that Mr. Brown may have been taking kickbacks from suppliers.

I should report here that yesterday, after my statement was prepared, Northrop reported that one of its supervisors, a Mr. Slotrem, did tell TRW, in a telephone call initiated by TRW, about Mr. Brown's being investigated. TRW has no record of this call, however, and has told us that it had no knowledge of Mr. Brown's misconduct prior to his arrest.

I should also note here that even after Mr. Brown's arrest, TRW's files do not clearly report his misconduct, and leave blank a question on whether he is eligible for rehire by TRW.

In the case of Mr. White, Northrop either didn't contact Garrett, or was unable to obtain useful information about him, since Garrett was not prepared to disclose the real reason Mr. Brown was laid off; namely, the belief that he was engaged in unethical busi-

ness practices. Garrett also did not disclose to Northrop the ongoing Garrett and FBI investigations.

Mr. White's personnel file is even more flattering than Mr. Brown's. It contains no references to the investigations, and one document, entitled "Exit Interview Results," describes Mr. White as having a good attitude toward the company and his job, and recommends favorable consideration for rehire.

These remarks are from the same company which, in response to our questions about kickbacks, reported a litany of allegations compiled by their security department, accusing Mr. White of taking trips, gifts, and cash payoffs from numerous Garrett subcontractors.

The deficiencies in the personnel files of Mr. Brown and Mr. White are representative of the generally poor internal recordkeeping practices in the 25 cases we studied.

For example, of the 15 buyers with kickback convictions, 7 of them have personnel records that do not mention their convictions; 22 of the 25 buyers have been subjected to one or more company investigations, yet 7 have clean personnel files that make no mention of an investigation. Of 33 personnel files reviewed by the staff, 17 had little or no information documenting the company's suspicions regarding the employee's misconduct.

This lack of documentation suggests that personnel offices may be unaware of important investigations being conducted elsewhere in the company, even after these investigations are concluded.

The staff noted two particularly poor areas of recordkeeping affecting the accuracy of employees' documents. In 21 separation documents asking whether the employee could be rehired, 62 percent of the documents left the entry blank or incorrectly marked the employee as eligible for rehire. In cases where an employee left a company under suspicion of taking kickbacks, 58 percent of the separation documents contained no specific reference to unethical conduct as the reason for the employee's departure.

The personnel files also demonstrated that companies did not readily seek or obtain information about job applicants for buyer positions.

For example, in 22 of 35 personnel files reviewed, there was no evidence that the prospective employee had contacted the job applicant's prior employer. Even worse, in at least four of the cases reviewed, the prior employer supplied wrong or misleading information.

Finally, the staff noted that employers who suspected their employees of misconduct often allowed these employees to resign rather than fire them. In 28 of the cases in which an employee left a company under strong suspicion of misconduct, 15 resigned. That means that only 46 percent, less than half, were discharged.

That concludes my prepared statement on behalf of the subcommittee staff. I would be happy to answer any questions.

Senator COHEN. Thank you very much, Ms. Bean, for a very thorough presentation and overview, and we congratulate you and the rest of the staff on your work.

Senator LEVIN. I have no questions. Let me just add my thanks and my statement of real dismay at the macrofigures that you produced. We will be looking at some specific situations today, but

your overall analysis is really, really compelling and very disturbing.

We are all grateful to you and the other members of the staff for putting in the kind of time that made those summaries possible.

Ms. BEAN. Thank you.

Senator COHEN. Next, we are going to hear from a panel of witnesses representing three defense prime contractors: the Garrett Corp., the Northrop Corp., and TRW.

Thomas Bennett is vice president of human resources and administration of the Garrett Corp.

John Richardson is the senior vice president for human resources of Northrop.

And Berwyn Fragner is vice president of the electronics and defense sector of TRW.

Gentlemen, would you come forward?

Mr. Bennett, I would like to have you begin with your statement, then Mr. Richardson and Mr. Fragner, before we ask any questions, to give you an opportunity to present your testimony.

STATEMENT OF THOMAS F. BENNETT, VICE PRESIDENT, HUMAN RESOURCES AND ADMINISTRATION, THE GARRETT CORP.

Mr. BENNETT. Thank you, Mr. Chairman. Good morning to you and members of the committee.

My name is Tom Bennett, vice president of human resources and administration of the Garrett Corp. of Los Angeles, CA. I am here to specifically speak to the phenomenon that has been here identified as the roving buyer problem.

The Garrett Corp. appreciates the opportunity to discuss this important matter.

In my written remarks,[1] submitted to the committee, I have addressed Garrett's policies in the case of Mr. White. I want to take this opportunity to address the broader issues.

In the first place, it is important for the subcommittee to know that Garrett has explicit and stringent policies prohibiting unethical business practices, written company policies prohibiting the appearance of conflict of interest.

Garrett's board of directors has appointed a committee to specifically monitor compliance with the company's standard of ethics. Each year all employees are required to sign a statement disclosing the existence of conflicts and certifying that they have not engaged in kickbacks and have not accepted gifts from vendors.

As set forth in detail in our written statement, Garrett's demonstrated practice has been to investigate fully allegations of unethical business practice and to report to proper Government authorities any individuals suspected of criminal acts.

Garrett's established policy is to discharge employees found to have been engaged in unethical business practices and to record in the personnel file the specific reason for discharge.

Consistent with general industry practice, Garrett has been very reluctant to advise prospective employers of the precise reasons for an employee's discharge. When Garrett receives a preemployment

[1] Mr. Bennett's prepared statement is on p. 55.

request form from another company about an employee, Garrett provides only the hire date, termination date, and the employee's last job description. We don't have a regular policy of providing information on why the individual left or will leave Garrett or regarding the individual's performance at Garrett.

Garrett has adopted this restrictive policy on disclosure because of a legitimate concern regarding employee lawsuits, alleging defamation, invasion of privacy, or a violation of California's blacklisting statute.

We recognize that the law does provide a qualified privilege for communication of relevant information between interested parties. However, the fact that the law provides a defense obviously does not protect an employer from the cost of defending lawsuits. Even if the lawsuit is frivolous and likely to be dismissed on motion, the plaintiff is usually entitled to discovery, which may be very expensive and time consuming.

For this reason we believe that circumspection in providing information to prospective employers is quite appropriate.

Nevertheless, because of Garrett's recent experience of having to discharge some employees for unethical business practices, the company is considering the adoption of a new policy. The policy under consideration would permit Garrett to advise prospective employers who submit a release signed by the employee or the former employee of the specific reasons why the employee was discharged.

For example, we would disclose if he was discharged for unethical business conduct or discharged for conflict of interest.

This proposed policy would apply only in those circumstances where the employee is confronted with evidence of unethical conduct and the employee admits to those allegations. If the employee refuses to admit to the allegations but Garrett's investigation uncovers evidence sufficient to support an involuntary discharge for unethical conduct, Garrett will disclose only that the employee is not eligible for rehire.

We believe that advising prospective employers that an individual is not eligible for rehire will put a prospective employer on notice that it should inquire further into the employee's employment record.

We are currently evaluating this proposed policy in order to balance several factors—the company's interest in avoiding litigation, the employee's interest in fair and accurate reporting of employment history, and the interest of our industry in assuring the effectiveness of our hiring practices.

When hiring new employees, Garrett makes every effort to obtain all information about an applicant's suitability for the job. In order to make these inquiries, Garrett requires a signed release by a prospective employee. We have provided the same blank form to the committee.[1]

This form specifically asks for the reason the employee left his former employer and whether the employee is eligible for rehire.

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[1] See exhibit A on p. 66.

When an employee at Garrett is terminated, an employee status notice is prepared and shown to the employee. We also provided a copy of that document to the subcommittee.[1] The precise reason for the termination is normally spelled out on the form.

Garrett is committed to solving the roving buyer problem. We believe that our established policy of reporting to and cooperating with the proper authorities will go a long way toward the solution of this problem.

In addition, we hope other companies will consider personnel proposals such as are under consideration at Garrett. While the problem is more complex than it may at first appear, it can be solved without legislation by an industry committed to resolving it.

We appreciate that this hearing will help focus the industry on this problem.

Thank you very much for the opportunity to be here today to present Garrett's views. I am prepared to answer any questions you may have.

Senator COHEN. Thank you very much, Mr. Bennett.

Mr. Richardson, would you proceed, please?

TESTIMONY OF JOHN J. RICHARDSON, SENIOR VICE PRESIDENT, HUMAN RESOURCES, NORTHROP CORP.

Mr. RICHARDSON. Mr. Chairman, members of the subcommittee, I am John Richardson, senior vice president of human resources of the Northrop Corp. I am pleased, as a representative of Northrop, to provide my views on the subject of certain employment practices in the defense sector of our economy. As you requested, we have submitted for the record a statement,[2] consisting of an overview of the problem you are considering combined with specific responses to questions addressed prior to the hearing.

We at Northrop are sensitive to the public trust placed in our industry. We are keenly aware of our responsibilities in helping to build a stronger national defense. We want that trust, and we accept that responsibility.

We also understand that the defense process cannot long survive without the trust and confidence of the American people. Unethical conduct of whatever nature and of whatever magnitude can undermine that trust and can weaken that confidence, and whenever or wherever it occurs the achievement of our national security objectives can only suffer.

For our part, Northrop does not tolerate kickbacks or bribes, paid or accepted, solicited or offered, directly or indirectly, or any other unethical conduct. Where such conducts exists, we want it ferreted out quickly and completely and the wrongdoers prosecuted whenever possible. Our past actions have demonstrated our commitments to these principles.

In this regard, Maj. Gen. Bernard L. Weiss, Commander of the U.S. Air Force Contract Management Division, in a recent speech to the Aerospace Industries Association, offered what I believe to be a useful perspective. The essential starting point, he said, is a firm commitment to high ethical standards.

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[1] See exhibit B on p. 67.

[2] Mr. Richardson's prepared statement is on p. 68.

General Weiss then stressed the need to follow through on that commitment, a followthrough that might include:

Strict internal audit procedures and a corporate level focal point for ethics program implementation.

A nonpunitive feedback mechanism for reporting suspected fraud and a highly visible ethics training program.

A disciplined procurement process and firm gratuities policies, policies which by the way should specifically define unacceptable conduct and emphasize that dealings with subcontractors, vendors, and suppliers are to be on the same basis as dealing with the Government.

Crossfeeding industry ideas on ethics—problems and solutions—throughout American industry whether in defense or otherwise and the development, promulgation and living by a code of ethics that sets the highest of standards.

In all of this there is a simple but fundamental reality. People make the commitment to integrity work, and people cause it to fail, and that is why thoughtful and effective employment practices can truly make an important difference.

A principal problem we face is that situations where improper procurement procedures are detected are not always black and white. As expressed above, when there is clear wrongdoing, the response must be swift and sure.

Investigation, termination, and, if appropriate, prosecution is the right sequence of events. Often, however, the situation is better described in shades of gray. It is here that dealing with the problem becomes much more difficult.

Our defense establishment exists to protect our way of life, a democracy founded on the respect for the freedom and rights of the individual. There is no question that all of us respect and are concerned with the rights to due process of all workers, with the legal statutes and regulations governing individual civil rights, and with responsible business conduct that makes for positive employee-employer relations.

At the same time there is also concern—and I speak from my vantage point in industry—for the protection of the interests of the company and the customer, and of course, in the defense business the Government is our customer.

The dilemma is unmistakable. On the one hand, the mere suspicion that an employee may be or may have been involved in illegal or unethical behavior is not sufficient legal cause for termination or for passing information regarding our suspicions to other companies, just as it is insufficient to merit criminal prosecution or conviction, and the impact on the individual employee can be disastrous if suspicions are wrong.

Under present law, the company must be prepared to prove that any company action, including termination for cause, is supportable, based upon substantial or clear-cut evidence of wrongdoing. On the other hand, if we are to respond effectively to public expectations and our customers' requirements, we must take all possible steps to address this issue.

As outlined by General Weiss, the most desirable initiative is prevention—maintaining a positive ethical environment. At Northrop, each employee involved in the procurement activities re-

ceives instruction in DOD procurement regulations and is required to sign an annual conflict-of-interest statement. This is in addition to the ethics training and code of ethics statement required of all Northrop employees and a corporatewide standards of conduct program now being implemented.

Multiple approval and review levels for purchasing activities are in effect wherever possible, and periodic internal audits are important features of the internal Northrop business environment, one that stresses prevention.

And we are constantly looking at ways to strengthen that environment, ways to build an ever more positive and sensitive awareness of ethical requirements.

For example, we are initiating an improved system to facilitate prompt reporting by vendors and employees of suspected abuses and ethical problems.

We are investigating the most effective and efficient way of rotating procurement personnel to make it more difficult for potentially unhealthful relationships to develop.

Let me interject and make this point, that it has been Northrop's practice, in situations where absolute proof of misbehavior would be difficult to obtain, to deal with the problem constructively. Where there is any question as to the propriety of an individual performing a procurement function, it may be possible to move that employee into a position without purchasing responsibilities.

Where there is sufficient indication of unethical conduct to confront an employee but not absolute proof, we may make an arrangement that allows the employee to resign. As we see it, this approach does not jeopardize individual rights. At the same time it removes an individual from the position where abuse was suspected.

A perfect solution? Far from it. But it does attack the immediate problem head-on.

We are also looking at how best to build greater understanding with our subcontractors and suppliers and to enlist their support in reporting suspected illegal or unethical behavior.

We are working to make our job interviewers more capable in the art of inquiry. As they go about their task of dealing directly with applicants, we believe that skilled inquiry can bring to light critical information before hiring decisions are made. Training these key individuals should bear fruit by teaching methods which probe deeply into applicants' background without violating legal restrictions or individual rights.

We at Northrop feel that the issues of kickbacks, bribes, and fraud in subcontracting impact the perception of integrity in our industry. Our senior management is dedicated to ensuring that appropriate measures are taken to deal with this serious problem. The focus which has been placed on this problem cannot fail to help bring it under control.

The subcommittee's attention and the efforts of DOD and the various investigatory and prosecuting agencies and of the judiciary will all work to create an environment in which it is clear that integrity and ethical behavior in procurement activities are the unquestioned standard, as in all facets of our business.

I would like to close by expressing my appreciation to the members of the subcommittee for providing the opportunity to share my thoughts on this important and complex issue.

By and large, we are impressed with and proud of the quality of our people who perform Northrop's many and varied procurement responsibilities, but unethical and improper behavior, even though not representative of the general population at Northrop or throughout the industry, must be reduced to the irreducible minimum.

The focus and attention that you are providing cannot help but contribute to the process of identifying solutions to accomplish this.

Thank you.

Senator COHEN. Thank you very much, Mr. Richardson.

Mr. Fragner.

TESTIMONY OF BERWYN N. FRAGNER, VICE PRESIDENT, HUMAN RELATIONS, ELECTRONICS AND DEFENSE SECTOR, TRW, INC.

Mr. FRAGNER. Mr. Chairman, Mr. Levin, I am pleased to be here today to testify on behalf of TRW in response to the subcommittee's request.

I am Berk Fragner, vice president of human relations at the electronics and defense sector of TRW, headquartered at Redondo Beach, CA.

My written statement [1] addresses your specific questions. My comments today will focus on my assessment of the primary issue.

How serious is the problem which these questions seek to address? Are we focused on the right issue? Indeed, is the problem solvable without compromising basic American rights?

Our Nation's employers, which include both large and small business, government at Federal, State, and local levels, conduct literally millions of employment transactions each month. Logic says that there will be a percentage of failures in such an active system.

We need to ask whether these failures are the norm, or whether they fall into a level of statistical occurrence that is not likely to be reduced.

Certainly, the problem of dishonest, unethical employees warrants our attention as well as yours, and certainly a sensitive profession like buyers should be above reproach.

I do not mean to belittle the problem. TRW does not condone unethical or dishonest behavior on the part of any of its employees.

But is this a more sensitive area than say brokerage or financial analysts or engineers or scientists who design our bridges, buildings, and spacecraft? I think not.

It signals to us that we need to look not at a single industry or profession perhaps, but at whether the problem is endemic to our free society where we emphasize employee rights, freedom from discrimination, and traditional American values.

All employers, including both you and me, make hiring decisions generally on factual information. I believe we also make some basic

[1] Mr. Fragner's prepared statement is on p. 78.

assumptions, including that workers are honest and ethical unless factual information says otherwise.

We must ensure that no system of blackballing or other discrimination results from any action we take to protect ourselves from people who are guilty of unethical practices.

Our great system, in an effort to provide full employment and equal opportunity to all people, has brought into the workplace a variety of disadvantaged people. These include people who have not enjoyed the benefits of American enterprise, people who have not had instilled in them what we might call traditional American values.

But "disadvantaged" is a broad term that includes economic disadvantage, social disadvantage—such as convicted and, we hope, rehabilitated felons—and people who have been disadvantaged based on race, sex, or religion.

I am especially sensitive to this area because I serve as the chairman of the Los Angeles County Private Industry Council. As you know, the Jobs Training Partnership Act, which resulted in the creation of the Private Industry Councils, seeks to provide training and employment for these disadvantaged people.

Disadvantaged people must enjoy the benefits of working in an environment free of any kind of implicit, as well as explicit, discrimination. We have all worked too hard to backslide on this.

Yet another factor is that the leadership of our national labor unions goes a step further. They seek to protect the worker from what they may deem as nonjudicious actions of management.

Today we have a legal system that, in case law, has assumed in many instances that business should not seek or provide certain kinds of information about people in the workplace.

There is a question, therefore, as to whether or not we have a broad national problem of a breakdown of American values and a loss of ethics. If this is what you believe, then we certainly have a problem that goes beyond a single industry or profession.

If, however, you believe that traditional values are largely intact for most Americans, then I think you could ask whether the problem we are studying today—in a single profession and industry—is but one example of reality, a reality that even in a pretty good system recognizes that failures will occur, even though we strive to eliminate them.

That is my belief, and it leads me to the following conclusions:

First and foremost, legislative patches for practices in a single industry or profession are not, I believe, the answer.

Second, people are generally honest and ethical in their business practices, but, in a system with millions of transactions each month, problems will occur.

Third, we all want a solution that balances the rights of people to freely move in the workplace with the rights of employers to prevent people with histories of unethical conduct from occupying sensitive positions. We must be able to do this without incurring the high cost of defending unjustified litigation for slander or libel.

In the employment process, I don't think the answer is written queries; release of liability, which currently doesn't protect us; increased involvement of the prospective employee in the reference checking process; or increased standardization, presumably through

legislation, of the employment applications or standardized reference check forms or separation documents.

What then can we do?

I think we must continue to train and coach hiring supervisors about the hiring process, including both serving as a reference and obtaining information on prospective employees. This means better questions and, equally important, better listening.

I think we must pay more attention to the separation process, particularly for employees who have been separated for unethical practices or conduct.

In TRW, we use a standardized separation form on which the supervisor should indicate whether or not the employee is eligible for rehire. Wherever possible, we try to clearly indicate why the employee may not be eligible to work for us again.

If adequate documentation underpins the determination that an employee is ineligible for rehire, then all of us must be willing to state not only "ineligible for rehire" but why.

Incidentally, the employee should have the opportunity to review, comment, and sign this termination form prior to departure. Such a practice might strengthen a company's position should the employee later challenge the reference provided by the company.

What I am really advocating is good management practice, which I believe will protect the employee and at least to some degree help protect the company.

Certainly all organizations should move aggressively to seek out, investigate, and weed out people involved in illegal and unethical practices. The fact that many do, and that these actions result in headlines, should perhaps be a commentary on what is right in the system, as well as what is wrong.

As you can see, I don't have magic solutions, but unless you believe that we have a problem of epidemic proportions in Government and American business in general, then legislative recourse is probably not a solution.

Protecting American Government and business from the more frivolous aspects of our litigation process is gaining momentum in various legislative actions and referenda throughout the country. I do believe that each of us in Government and business must assume greater responsibility for insuring that those people who engage in unethical or illegal business practices, as few or as many as they may be, are not passed from one employer to another without accurate representations.

I appreciate this opportunity to testify today, as well as to provide our written statement to the subcommittee.

I believe this interchange is a helpful approach in identifying and reducing a problem that concerns all of us.

Thank you.

Senator COHEN. Thank you very much, Mr. Fragner.

Let me make a couple of observations before we get to some of the questions. First, this hearing does not purport to be some sort of an inquisition with Senator Levin and myself sitting up here looking down from some moral platform condemning the defense industry. As a matter of fact, one of the first things that Senator Levin and I did when we came to the Senate back in 1979, was to

start conducting investigations into Government practices or lack of practices dealing with "debarment and suspension." That's a term I'm sure you gentlemen are familiar with, as well.

We found a rather atrocious situation within our own Government agencies, that one contractor who had been debarred or suspended from doing business with the Government because of either fraud or some other misconduct, could go right across the street to a different agency of the Government and get a new contract. There was absolutely no system and uniformity for dealing with those contractors who had been debarred or suspended, and there was no system in place and there was none intended to be, until we focused the spotlight on the Government's own inadequate practices.

So it is not as if we are trying to single out the defense industry.

Second, with respect to Mr. Fragner, are kickbacks an endemic problem? I would say we have a widespread problem in every facet of our lives in this country. The most recent revelations about Tradergate, I suppose, and Wall Street, is another example of it. What we have found, historically, through these investigations is a pattern that whenever you have an opportunity for making large amounts of money, whenever you have inadequate supervision, whenever you have a very low risk of being caught or apprehended, a low risk of being tried under indictment, a low risk of conviction, a low risk of being punished, and high profits, there is a very strong likelihood that you will have wrongdoing. That has been the risk across all faces of life that we know.

Senator Levin and I held hearings recently on the problem of ERISA. You mentioned the stock market. Is this worse than the stock market? We have a potential problem in dealing with ERISA, because of inadequate supervision, in my judgment. A problem that will come to bear in the next 5 or 10 years, because of the amount of money that is involved and the absence of adequate supervision and management oversight on the part of the Government agencies charged with that.

So I believe that we can't mandate honesty. That cannot be done. There is no set of laws, no set of regulations we could possibly weave that we could insulate men and women against the temptations to do something wrong, to gain financially from that.

What we can do is try and insist upon a set of procedures that minimize that particular opportunity. It's not only a question of whether any of you gentlemen say, and I believe this, each company has a declared policy against wrongdoing, unethical behavior. That doesn't seem to be the problem. In the words of former Attorney General Mitchell, "watch what we do, not what we say."

The point is, we make very strong statements, but the practice may not quite measure up to what the statements would indicate. That's the context in which I would like to proceed in these particular hearings.

I think all of you gentlemen have been very forthcoming, and what we would like to do is to see whether or not there is some sort of solution, short of legislation, that can perhaps modify the existing practices to reduce that so-called revolving door.

I notice, for example, from your written testimony, all of you would like to have more information from those employers who

have hired individuals that you now contemplate hiring. All of you are very, very reluctant to give more than name, rank and serial number, date of employment, date of termination. And that is about the extent of it for people that you let go. Yet when you hire individuals, you would like to have more information. For example, reasons for termination of employment.

The first question that comes to mind is, How do you explain this discrepancy between here saying, on the one hand, you fear litigation, lawsuits for defamation, and libel, while, on the other hand, you would like to get more information from other employers about the people you are about to hire? How can you expect to get more than you're willing to give, Mr. Bennett?

Mr. BENNETT. Excellent question, Senator.

You probably can't get more than you're willing to give in a situation like that, which makes it difficult. It all goes back to what I consider this balancing that you have to—that we face in the industry—between what the company wants to know, the protection of employees or former employees, their privacy and their rights, and what we can do as an industry.

My suggestion is that we try to get together as an industry and come up with policy which will allow us to exchange information and perhaps take the risk of litigation.

Senator COHEN. How real is this risk of litigation? What's been your experience? What's been your experience with lawsuits recently?

You mention the statute in California, where there's a heavy concentration of defense contractors. What has been the experience of lawsuits for the termination of employees? In other words, are your fears well-founded?

Mr. BENNETT. Well, if the practice is to give as little information as possible, the likelihood of litigation decreases.

Senator COHEN. I understand that.

Mr. FRAGNER. It works.

Mr. BENNETT. So the question is, What will happen if we change our policy? Will litigation go up? I don't know the answer to that.

Mr. RICHARDSON. I was going to say, we've had wrongful termination litigation. I think we've been very successful in defending the company, where this is the case.

Senator COHEN. How frequent? How often?

Mr. RICHARDSON. Most of these cases have to do with discharging employees who are filing suits on the basis that they were wrongly discharged for a number of reasons. I don't know the exact number, but I would say that we've not suffered great loss, in terms of costs associated with wrongful discharges. The big issue here is balancing again what's right for the individual versus what's right for the company.

I believe we probably have, in a democratic society, erred in favor of the individual. There's no question that we have done that. The issue now is, can we err the other way, to the extent of providing greater information and taking greater risk. I think, as contractors, we've got to take the greater risk. I really believe that.

Mr. FRAGNER. We have had a case recently of wrongful discharge, discharge based on unethical conduct. We've had many other wrongful discharge suits. I get involved, I would say, virtual-

ly in every settlement that is made. I refuse to let it just be made without involvement of the employer. In this case, we insist that we go to trial. Other times we will settle it, simply because at times it's cheaper to settle. We went to court on this one, because of a couple of reasons. One, unethical conduct was involved, and we would not settle anything on that basis. We were either right or we were wrong. But we were certainly willing to let a jury determine that. We did go to trial, and we were vindicated, but the costs were very substantial. I can't give you the figure right now, but they were very substantial, and they're unrecoverable.

I think you have to make a distinction that at least I made, and it may be somewhat technical, but it's worth keeping in mind. There are two processes that go on. One is what I call employment verification. That's generally a form sent to an activity in an organization that deals with forms being sent in. They just look at what's on existing records, and I suspect that's a good example. We send a form. The computer generates something else. That's employment verification.

The other process is reference checking. That's a different process entirely. It's generally verbal. Most of us, I think, have some forms that employees fill out or the hiring supervisor fills out, based on a telephone call, primarily. I can't think of a case where one of our supervisors went to visit another supervisor and sat down. So it's generally done by telephone. Most of us ask for an assessment of the credibility of the reference check as part of the process. I've gone through employee files, and I find all kinds of blank spots that should have been filled in by company policy. I still think that we can document our files and say this employee is ineligible for rehire, and whether ethical conduct was involved. Or you could use, as in our case, we might just say "Company code No. 1" or "Company policy No. 1." We know in our company, that's our first policy.

Senator COHEN. Does the other company know that "code 1" means it's an ethical violation?

Mr. FRAGNER. That's code No. 1, unethical conduct.

Senator COHEN. Is that uniform throughout the industry?

Mr. FRAGNER. No; it's for our company.

Senator COHEN. Well, it doesn't do much good to say it, then.

Mr. FRAGNER. Then we generate a reference call of a very specific nature rather than a random reference call. Was this a good, performing employee? Was this employee—was he tardy? Did he have excessive sick leave? The kind of things supervisors tend to ask. Or technical questions about job content. It is a triggering mechanism more than anything else. I think that if we document our files accordingly, and the employee is given an opportunity to sign off on that on termination, then you've got yourself the basics for at least moving into a more factual disclosure for the why of termination.

That won't stop the cases, where someone says, I resigned, you can't fire me. In our company, we take the position, you can't resign. We just fired you. And we document it as such. If somebody is under investigation, they may not resign.

Senator COHEN. Mr. Bennett is the only one of the witnesses so far this morning who has indicated that his company may change

its policies by providing information on the reason for the termination of employment and eligibility for rehiring to a new employer if a release had been signed, provided that the individual had, in fact, admitted to the allegations. Is that correct, Mr. Bennett?

Mr. BENNETT. There are two points we are struggling with in that regard. One is, if there's no question, if we do change our policy and go this way, and the person has admitted to the allegations, we will reveal that the person was discharged for unethical conduct, conflict of interest.

Senator COHEN. Without a release being signed by that individual?

Mr. BENNETT. We would want a release coming back from the other prospective employer, that this person had signed, to release us from liability.

Senator COHEN. Have your attorneys advised you that, in their judgment, that will not protect you?

Mr. BENNETT. The attorneys have advised me that the likelihood of a release protecting us is not the greatest in the world, but you have to take the risks. That is the point. You have to take risks.

Mr. RICHARDSON. I think that's what we're really talking about is revising our attitude and our policies, so that we can take greater risks. I think if we take an action and the action is a part of the record, we should not be afraid to report that as an action that we've taken.

So if we do suspect somebody for improper or unethical behavior, we ought to be able to report that. Now that doesn't protect you from being sued. As a matter of fact, even if you make a reference check and those references are given to you in writing, technically, the employee has the right to see those references. So there's a lot of issues here.

On the other hand, we have to be prepared to take that kind of risk.

Senator COHEN. Let me go through a series of questions all of you can answer with a yes or no. This is not some trick on my part to try and box you in, but I just want to go through a series of situations to ask you what your company policy either is right now or might be in the future.

If a former employee were convicted of taking kickbacks while working for your firm, would you relay that fact in response to a reference check from a prospective employer? Mr. Bennett?

Mr. BENNETT. I would think so. It's public knowledge.

Mr. FRAGNER. Yes.

Mr. RICHARDSON. Absolutely.

Senator COHEN. What if the employee had been indicted, but not convicted? Would you relay that information?

Mr. BENNETT. Yes.

Senator COHEN. Mr. Fragner.

Mr. FRAGNER. On the reference check, but not necessarily on the employment verification.

Mr. RICHARDSON. I think if the indictment was public record, we would. If the indictment was secret, then we might not reveal that information.

Senator COHEN. Would you let a prospective employer know about a grand jury investigation, investigating the actions by one of your former employees? Mr. Bennett.

Mr. BENNETT. It depends on the circumstances. Is the grand jury investigation a public investigation? It's always secret? That's a close one.

Senator COHEN. But you know that he is being investigated or she is being investigated by the grand jury. Would you convey that information on to a prospective employer?

Mr. BENNETT. I'd have to think twice about doing something like that.

Mr. FRAGNER. I would, if the reference check came to me, but oftentimes, the people who are dealing with that may not know that an investigation is going on. They just may not know.

Senator COHEN. Would you convey that to a prospective employer. Another employer contacts you and says, "We've got this gentleman we'd like to hire. Can you tell us anything about him that we should know?" And you know that that individual is under investigation by the grand jury, would you convey that?

Mr. FRAGNER. I think I would.

Mr. RICHARDSON. I personally would say it, if I knew who was on the other end. I don't think a personnel clerk would reveal that information, however.

Senator COHEN. You wouldn't put it in writing then?

Mr. RICHARDSON. No.

Senator COHEN. What if the situation were that the individual who's going to be hired by this other company was under investigation by the FBI, and you knew the FBI was conducting an investigation of this particular employee, who had since left your employment. Would you convey that information?

Mr. BENNETT. Probably not. We've had a situation in our company where the FBI was conducting an investigation. It was covert at the time, and at that time, we wouldn't have released any information because of the covert nature of the investigation.

Senator COHEN. Mr. Fragner.

Mr. FRAGNER. Again, the same answer. If I am the person giving the reference, I would do so, because I have some responsibility for people I pass on, whether that would be known in the system to a normal reference check to a supervisor or an employee is highly unlikely.

Senator COHEN. Mr. Richardson.

Mr. RICHARDSON. I would agree with Mr. Fragner's answer. Probably, highly unlikely.

Senator COHEN. Let's assume there is no Federal investigation, but your company has become suspicious of the activities of a given individual.You decide to conduct a company investigation and, as a matter of fact, that particular individual has admitted to taking kickbacks. Would you reply in a reference check about an individual in that case, where the company has done the investigation?

Mr. BENNETT. I would now; yes.

Senator COHEN. That's your new policy?

Mr. BENNETT. Yes, sir.

Senator COHEN. Under the old policy?

Mr. BENNETT. Under the old policy, the likelihood is, we would give name, rank, and serial number.

Mr. FRAGNER. I'm sorry. If an investigation——

Senator COHEN. If you had conducted the investigation—no FBI, no grand jury, no indictment, no conviction—but you were satisfied after your internal investigation that this individual has, in fact, been engaged in unethical conduct, and, in fact, he or she has admitted the unethical conduct. Would you convey that?

Mr. FRAGNER. Yes. Because in a follow-on to what we originally said, that employee's just not punished. Punishment, to us, is—you're fired. Discipline would be, you're in the system.

Now if it is a discipline, and we are trying to rehabilitate the employee, we may or may not disclose that, depending on what's in the file. Sometimes we will document that in the file forever. Sometimes we will document it in the file for a limited period of time while the employee is going through a period of probation, if you will.

Senator COHEN. Let's assume you terminate his employment.

Mr. FRAGNER. Yes, ineligible for rehire. No question about it.

Senator COHEN. Ineligible for rehire as a particular reference on your internal documents, would that be conveyed to a prospective employer?

Mr. FRAGNER. To the best of my knowledge.

Mr. RICHARDSON. In general, yes.

Senator COHEN. What if you have a prospective employer who contacts you and your company has had strong evidence, such as tape recordings that implicated a former employee taking kickbacks, but he had left the firm before he had actually taken them and before he had been confronted? What would you do then?

You have got strong evidence, tape recordings, about unethical behavior, and he is gone.

Mr. BENNETT. And I hadn't confronted the employee with that information?

You know, I think in fairness to the employee, or the former employee, I don't know whether I would reveal that.

Senator COHEN. Mr. Fragner.

Mr. BENNETT. You have to balance it.

Senator COHEN. You have got the tapes. You say here is the information we have got on Mr. X, Mr. Brown, or Mr. White, or whatever you want to call him, and he has since decided to leave your company and he is now over at a competitor. The competitor calls you and says what do you think of Mr. X.

You say name, rank, serial number, date of employment, date of termination, no reasons given?

Mr. BENNETT. Let me—is it a tape where somebody is alleging that Mr. X, Brown, or White, whoever?

Senator COHEN. Your internal investigators have been watching Mr. X because of perceived irregularities. They have some tape recordings that they have acquired of his conversations with other people which would clearly indicate to you that there has been wrongdoing.

But this individual has left your employ and gone elsewhere. A prospective employer calls up and says give me a reference on this individual. Is he a good person?

Mr. BENNETT. And I haven't confronted the employee with this. I think in fairness to the employee it may be that I would say nothing.

Senator COHEN. Mr. Fragner.

Mr. FRAGNER. To start with, if we were at that point, we have already turned it over to a Federal agency or the FBI in some cases.

Senator COHEN. You would have turned that over to the FBI?

Mr. FRAGNER. Yes, sir.

Mr. BENNETT. Oh, we have, yes.

Mr. FRAGNER. In some cases we turn it over to the local prosecutors because it is of a different nature. Petty cash embezzlement, for example, might go to the local prosecutor.

But if it is only suspicion and/or if the investigation has not been completed, I don't think that would be revealed on employment verification checks, and it may or may not be revealed, depending on who is called on the reference check.

Senator COHEN. If the individual left your company before you contacted the local authorities, would you continue?

Mr. FRAGNER. Yes, we would. We really would. And to a large extent, as I indicated earlier, the employee can't come in and say "I quit" in the middle of an investigation. I assume that that is the way the records would eventually show he or she left the workplace.

Senator COHEN. Mr. Richardson.

Mr. RICHARDSON. We do very much the same thing. We turn it over to the appropriate investigative agency for further consideration. If the individual left the company, we would continue the investigation to make a determination on how the individual should be treated in the future. We would really want to know what was going on.

Senator COHEN. I am asking these questions to try and lay at least the groundwork for an examination of the two case studies that the staff has conducted of Mr. Brown and Mr. White.

I don't want to dominate the questioning at this point, so I am going to yield to my colleague, Senator Levin, who can perhaps begin with an examination of the factual situation on Mr. Brown.

Senator Levin.

Senator LEVIN. Before we get to those two cases to see how the theory was applied to practice, let me just make sure I understand the answer to one of those questions from Senator Cohen.

If you confronted an employee with the evidence of your investigation and that employee said I would like to resign right now before you fire me, would the fact that that person resigned under those circumstances be disclosed to the next employer?

Mr. BENNETT. We wouldn't allow the person to resign.

Senator LEVIN. Mr. Fragner.

Mr. FRAGNER. We would discharge him, involuntary separation, not eligible for rehire.

Senator LEVIN. Mr. Richardson.

Mr. RICHARDSON. If the investigation had not been complete and we weren't sure of what the circumstances were, we would suspend the individual.

Senator LEVIN. And if the individual resigned, would you disclose that fact to the next employer?

Mr. RICHARDSON. At the present time, no. In the future, I believe yes. That is what we are heading for.

Senator LEVIN. Mr. Bennett, when you say that you are now going to change your policy in this matter, is that something you are still considering, or is that something which you have already decided?

Mr. BENNETT. We really haven't fully implemented any policy. We are still considering—we are working with the human resources managers of the various divisions and our counsel to go through the balancing act we have to go through to get this in the proper perspective.

My own personal view is we are probably heading in that direction, and that is where we have been going.

Senator LEVIN. So that, again, you are considering changing your policy; you haven't yet adopted it?

Mr. BENNETT. We have not yet adopted it, but as far as I am concerned, that is the direction we are heading.

Senator LEVIN. That is what we are to understand—what you meant when you say "now your policy is"—you mean you are now looking at that change?

Mr. BENNETT. That is right, and we will probably go that way.

Senator LEVIN. Your policy at the moment still is as you indicated on page 2 of your testimony, that Garrett does not make it a policy of providing information regarding why the individual left or will leave Garrett or regarding the individual's performance while at Garrett?

Mr. BENNETT. That is correct.

Senator LEVIN. That present policy would apply to the folks who are now the subject of a grand jury investigation, as I understand it.

You would not, even in that case, where they were discharged for conflict of interest, disclose that at this point?

Mr. BENNETT. I think we will at this point in time. I think we will.

Senator LEVIN. You will disclose that they were discharged for conflict of interest?

Mr. BENNETT. The individual who is under the investigation, yes.

The question comes out as to striking a balance in this regard from the standpoint of not only unethical conduct but other kinds of conduct—someone who was laid off for a fight or for absenteeism.

Senator LEVIN. I am not talking about that. I am talking about individuals who are discharged for conflict of interest now, right now. It is still your current policy not to disclose that fact to a subsequent employer?

Mr. BENNETT. That is correct.

Senator LEVIN. I think you all would agree that you ought to be able to do that.

Is that clear enough?

At least in two of your cases you are not now doing that. You are moving in that direction, but you are not now doing that, is that

correct, in terms of Mr. Bennett and Mr. Richardson? You have already answered that you are now moving in that direction?

Mr. Richardson.

Mr. RICHARDSON. Our present policy would be we do not provide that information. I am saying that we would now move in that direction and provide factual information. If the person is suspended, I believe we would provide that information.

Now, it is important to recognize that that information would be provided on a reference check—probably some individual in the company that had enough understanding of the issue to be able to report it. It may not show up on the printed form that comes into the personnel office because that is a recordkeeping form.

Senator LEVIN. Why don't we get to that form there, and perhaps I can start on that. Then Senator Cohen can pick up.

You have indicated, Mr. Richardson, that you do indicate to folks whether or not people are eligible for rehire or not, and yet on that form that TRW sent you, which is on the left over there, there is a blank space after the question "Eligible for rehire?"

I am wondering why that wasn't filled in if it is your policy to inform people.

Mr. RICHARDSON. The policy we have with respect to eligible for rehire is only in the organization from whence the individual was terminated, not as a company. In other words, no single individual in the company has the right to determine whether an individual will be rehired by the company. I am talking about foreman or first line supervisor or manager. That is an industrial relations decision as to whether the individual can be rehired into the company.

Senator LEVIN. In that case of Mr. Brown, the company had already reached the conclusion that he was not eligible for rehire?

Mr. RICHARDSON. In the procurement organization only.

Senator LEVIN. According to exhibit B–3, it specifically says that he is not to be rehired. You are saying that was the security department?

Mr. RICHARDSON. That was the security department and relates only to that particular activity and doesn't speak for the company. We do not use eligible for hire or not eligible for rehire as a company position. We no longer fill that in.

Senator LEVIN. I thought you testified a moment ago that if somebody was ineligible to be rehired, that you would convey that.

Mr. RICHARDSON. I didn't say that.

Senator LEVIN. In answer to Senator Cohen's question?

Mr. RICHARDSON. I didn't say that, Senator, no.

Senator LEVIN. You no longer make a determination as to whether somebody is eligible or ineligible for rehire?

Mr. RICHARDSON. Not at the time of termination—but at the time of rehire that decision is made. All of the facts are then reviewed and determination is made as to whether that person is reemployable in some other capacity.

We do not want foremen or other first line supervisors making the statement that the individual is not eligible for rehire in the company, just in that department.

Senator LEVIN. Is Mr. Brown eligible for rehire?

Mr. RICHARDSON. Under the circumstances, more than likely not.

Senator LEVIN. Would that information be supplied to any other employer who asked you that?

Mr. RICHARDSON. At the time of that particular document?

Senator LEVIN. No, right now. If you got that form from TRW now, would you fill that in?

Mr. RICHARDSON. Knowing what we know about Mr. Brown, I wouldn't necessarily fill it out in the form, but I would certainly reflect that in the reference check.

Senator LEVIN. Why wouldn't you do that on the form? You said you ought to be able to state any factual findings or actions on your part.

If he is not eligible for rehire, why wouldn't you tell somebody who asked you whether he is or not?

Mr. RICHARDSON. I would tell them if they asked me personally.

Senator LEVIN. I mean on the form. Why wouldn't you say no, if that is the conclusion?

Mr. RICHARDSON. It is not our position to do that.

Senator LEVIN. And then Mr. Bennett.

Mr. RICHARDSON. You are isolating it as to procurement people. I am trying to generalize across the company. We do not do this as a policy.

Senator LEVIN. Let me go to Mr. Fragner.

When you got that form back with a blank on it, didn't that alert you?

Mr. FRAGNER. No, sir. That is a fairly common practice, I think, to send out a form and get back a different form to the company's own practices, standards, and system.

For example, if you look at that, I would have to assume—and John can confirm it—that Northrop's system is automated. If there is nothing in that automated system, it is not going to come out.

Senator COHEN. He is not going to put it in.

Mr. FRAGNER. I understand that. On the other hand, I understand that they are getting a fairly significant number of employment verifications every day, and that is why they went to an employment automated system.

Senator LEVIN. Wasn't that worthy of a phone call, to find out whether somebody is eligible?

Mr. FRAGNER. We do make phone calls.

Senator LEVIN. Was there one made there?

Mr. FRAGNER. There was one made there.

Senator LEVIN. What was the response?

Mr. FRAGNER. The response was—at least our records show that either the question was not asked or there was no response.

What I have to assume is that there was no dialog that alerted us to anything about Mr. Brown, as there would have been based on what Northrop was saying. If you look at B-6——

Senator COHEN. Who did you contact, for example——

If you don't mind?

Senator LEVIN. Yes, sure.

Senator COHEN [continuing]. When you made a reference check?

You didn't go to the supervisor, you didn't go to management. Apparently, you contacted a coworker.

Mr. FRAGNER. I cannot explain more. Generally, it is supervisors. The only explanation—the person who did it is no longer employed by TRW. So it is hard to find that person.

I have to assume either that the supervisor was not available or for some reason they went to that one. Frankly, there should be more than one, but there was only one. There should be more than one check.

Senator LEVIN. As I understand, it they called the reference that Mr. Brown gave.

Mr. FRAGNER. One of the references he gave.

Senator LEVIN. Did your record disclose that somebody else was called, that the supervisor was called or someone other than the reference that Mr. Brown gave?

Mr. FRAGNER. No.

Senator LEVIN. On that reference check, there is a question that you asked: Was he or she eligible for rehire? And that shows a blank after that.

Mr. FRAGNER. I have to assume that the question was probably asked and there was no response to it, or the question was not asked.

Senator LEVIN. So either the person who made the reference check didn't ask the question on their own form or there was silence at the other end of the phone when the question was asked?

Mr. FRAGNER. It could be either one of those.

Senator LEVIN. Shouldn't that have been reflected on the form if they won't answer the question?

Mr. FRAGNER. You are talking about whether or not somebody filled out a form very completely?

In this particular case, this person in employee relations might have been doing 15 or 20 of those that day, and the documentation is never what you want it to be when you have got that problem you are looking for. It doesn't work that way.

Senator LEVIN. Mr. Richardson, I understand that your records show that there was disclosure to TRW of the problem.

Mr. RICHARDSON. That is correct.

Senator LEVIN. So your records differ in this respect?

Mr. FRAGNER. I have tried to track that down and talked to the supervisor. He claims he never talked to anyone.

Senator LEVIN. What I am saying, your records or the recollections of your people differ in this regard. Their records show that they did disclose. Your records show that they didn't.

Is that a fair statement of the recollections of your people?

Mr. FRAGNER. Their recollection says that they disclosed, our recollection says they did not, and without enough documentation on either part.

Senator LEVIN. That is what I am saying. There is a very clear difference in recollections here.

Senator COHEN. Could you yield just a second?

The staff has just advised me that when we checked the reference of Mr. Gene Brown yesterday, Northrop said that no one by that name worked there. So it may have even been a phony name that was given.

Mr. RICHARDSON. He was terminated.

Senator COHEN. Gene Brown was terminated?

Mr. RICHARDSON. Yes, sir.

Senator LEVIN. There is obviously a significant problem that we have here, folks. I would like to get more into the specifics, but I am going to turn it back to Senator Cohen at this point.

We clearly ought to be free, and are free, I think we will hear later, to tell other companies whether or not somebody is eligible for rehire. And the records of the company ought to indicate that that person is not eligible for rehire. And that that person has been suspended. You ought to be able to tell a second company that that person has been suspended.

If a person resigned after being confronted with certain evidence, we ought to be able to pass along that factual information, which occurred, that is part of an employment history.

We don't have—you are saying you are looking at changes in your practices now; Mr. Richardson is saying the same thing, and that is fine. But for the moment at least we have got gaps that result in people literally leaving companies through the back door, kind of being pushed out, and then walking in the front doors of other companies, and we have got to end it.

Maybe Mr. Fragner is right, that ethical problems of this scope exist in other industries. I can't comment on that. That is not the focus of this.

I know we have plenty of ethical problems in other industries, but we have got a problem right here that we have got to look at. When you tell me that people—and we know that people who are not eligible for rehire right now at one company can be hired by another company and that second company, when they ask the first company, won't even be told by the first company that they are not eligible for rehire by that first company, I have got to say something is either wrong with the practices of the industry or with the law.

And I think it is the former. Again, we will hear testimony on that later on this morning.

I will come back for a second round, but I do want to yield back to the chairman.

Mr. FRAGNER. We supplied the subcommittee with other documentation, and let me show you that. This is probably the proper way to do it.

This is where we, TRW, separated an employee whose name will be Mr. Green for my purposes. Our separation form says "Reason for separation: Violation of company policies regarding accepting gratuities from suppliers which are beyond the common courtesies usually associated with ethical business practice, specifically but not limited to," and then it details some of the terms.

That is the form that will be used by somebody going to a file to verify employment with TRW.

At the bottom of the form are the employee's comments: "At this time I feel this action to be extreme. At some time in the future, I hope to take action to seek reinstatement of position at TRW."

Signed by Mr. Green.

Regarding eligible for rehire, not eligible for rehire.

It is a very clear, explicit statement.

Senator COHEN. Is that just in your department or in your company?

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Mr. FRAGNER. That is in our company, not in a department, in our company. Once that determination is made, it is a company-wide determination.

Senator COHEN. That is somewhat different than in Mr. Richardson's case, where "not available for rehire" means just in that particular division of your company.

Is that right?

Mr. RICHARDSON. That is possible.

Senator COHEN. And yours, when you say not available for rehire, that means companywide.

Now, does that information go on to another prospective employer? Is that part of his personnel file?

Mr. FRAGNER. It is part of the personnel file. We are not automated on verification, and it came in in employee verification, and presumably the file would be pulled. This would probably be the cover sheet or the top sheet on it, and the clerk—because that is generally how it is done— would verify and would make that identification on the form.

Does that handle it? I hope to say it does, but I can't guarantee it.

Senator LEVIN. Just one quick follow-up, if I could, on one form of yours, Mr. Fragner.

If you would look at B-11. This is your personnel status change relative to Mr. Brown.

There is a section down there that says "Termination involuntary." Then it says, "Comments regarding eligibility for rehire" and caps after that, "MUST BE COMPLETED." But it is not.

Mr. FRAGNER. If you go to the prior one, B-10, and the prior to that, B-9, I think you will see the documentation that would explain that involuntary separation. Oftentimes what the clerk of course will do is not restate it but just assume that that documentation is backing up that and is there for somebody to read when they verify employment.

Senator LEVIN. Shouldn't there be some reference in that section saying "Comments regarding eligibility for rehire—MUST BE COMPLETED" that says "MUST BE COMPLETED IN YOUR OWN FORM"?

Mr. FRAGNER. Since I am a very orderly person and a very good administrator, if I filled it out, I assume I would do it, but I can't guarantee. Obviously, it didn't happen. Should it have happened? I think it should have.

But I also know that these letters are in that same file.

Senator LEVIN. The letter, by the way, says that "An incident on April 23 has caused TRW to take certain steps with regard to your employment". The "incident of April 23"—why isn't it specified? Why do you pull punches on that? Why shouldn't your files disclose what that incident is?

Mr. FRAGNER. Because the FBI came into our plant on April 23 and removed the employee from our premises. At this time we placed him on suspension.

Senator LEVIN. Shouldn't that be specified as to what the incident was? He was arrested, wasn't he?

Mr. FRAGNER. I assume he was.

Senator LEVIN. Thank you.

Mr. FRAGNER. He may have been brought in for questioning. I don't know whether he was arrested.

Senator COHEN. Mr. Richardson, is there anything in Mr. Brown's personal file that would alert Northrop to the suspicions that you had about Mr. Brown? Is there anything in that file that would put them on notice that this individual was someone highly suspected of having engaged in illegal or unethical activity?

Mr. RICHARDSON. The file would show that the individual was placed on leave or suspension and then subsequently was terminated. That would be an alert to people internally within the company. It may not be to people outside the company.

Senator COHEN. As a practical matter, it is only for your own protection; it has nothing to do with protecting a future employer against hiring somebody that you would like to get rid of?

Mr. RICHARDSON. Not until such time as there is a resolution of the issue.

Senator COHEN. So in other words, the person has to be convicted?

Mr. RICHARDSON. Well, the investigation has to be complete, and it wasn't.

Senator COHEN. Did anyone at Northrop alert TRW to the fact that Mr. Brown was the subject of an ongoing grand jury investigation?

Mr. RICHARDSON. Yes, his former supervisor.

Senator COHEN. Whose former supervisor, Mr. Brown's?

Mr. RICHARDSON. Mr. Brown's former supervisor alerted TRW. We had a call from TRW, Colorado Springs, to that supervisor, and that supervisor recalls distinctly that he told that individual that Mr. Brown was under suspension for improper conduct, that no decision had been made, and that is what he reported.

Senator COHEN. Any explanation as to what the improper conduct was?

Mr. RICHARDSON. No.

Mr. FRAGNER. Let me comment about that. John and I don't want to get into a contest, and I can't dispute that. But it is very unlikely that the position of this individual could only be filled by this individual and that a supervisor, particularly in that installation, would have gone out of his way to ignore that kind of a signal.

There were other candidates involved in filling that job. I have since talked with the supervisor. He doesn't know.

Now, could this come in with someone else? It is conceivable, but again this is such a sensitive issue, and we have had such sensitivity on that, and have had for years, that we doubt that somebody would hire somebody in the face of that clear a signal. It just doesn't make any sense.

Senator COHEN. Let me move on to the case of Mr. White.

He ostensibly was terminated or laid off because the program he was working on was terminated. That is the official reason given, and he was later hired by Northrop. In fact, Mr. White was under investigation by both Garrett and the FBI for alleged kickback activity.

Mr. Bennett, what were the allegations against Mr. White?

Mr. BENNETT. The allegations against Mr. White, as I recall, were he was alleged to be taking kickbacks from vendors. He was also alleged to have been using condominiums and other favors like that during his employment.

Senator COHEN. In view of the evidence that was available to your company, two audio tapes which specifically implicate Mr. White, why was there no mention of this on his employee status?

Mr. BENNETT. Well, at the time Mr. White was laid off, as the official record shows, the Federal Bureau of Investigation was doing a covert investigation at the Garrett Corp. at one of its divisions. The FBI had the information on Mr. White.

What had happened was that the supervisor, I believe it was the materiel manager in the department Mr. White worked in—had some suspicions with respect to Mr. White using a condominium or having a vendor pay for a trip to a hotel. In addition to that information, the investigation that was started through the division itself, we started an investigation as a result of information we received from outside the company and then brought the FBI in.

We were investigating Mr. White, about the end of March, the investigation went through October. The supervisor, one of the people in supervision in his department who had known about this wanted to release Mr. White. We did not want to do so because of the fact that there was a covert investigation going on—there wasn't any question that we wanted to release Mr. White because he is a bad apple and we wanted to get rid of him.

So we decided in conjunction with the FBI to lay Mr. White off so as not to give him any suspicion that this investigation was going on. That is precisely what happened.

Senator COHEN. So the FBI had asked for your cooperation in not disclosing an undercover or covert operation?

Mr. BENNETT. Oh, yes, sir.

Senator COHEN. And that, in your judgment, precluded you from conveying information to another contractor?

Mr. BENNETT. Yes.

Senator COHEN. Had the FBI not been involved in this covert operation and you had access to the audio tapes and the internal reports, would you have conveyed the information but for the existence and intervention of the FBI?

Mr. BENNETT. Under existing policy, we would probably be very circumspect in doing that.

Senator LEVIN. You mean you would not? [Laughter.]

Mr. BENNETT. Under existing policy.

Senator COHEN. As you know, Mr. White was hired by Northrop in August 1985, about a month after his departure from Garrett. Could I ask whether Garrett contacted Northrop at the time Mr. White was hired?

Mr. BENNETT. We wouldn't have known.

Garrett would have contacted Northrop? I don't recall.

Senator COHEN. Since that time, has Garrett been contacted by Northrop about Mr. White?

Mr. BENNETT. I was contacted once by John.

Senator COHEN. Let me tell you what is most puzzling to me. The notation on the employee's status notice, which is exhibit W-1, in-

dicates that Mr. White should receive favorable consideration for rehire. How did that occur?

Mr. BENNETT. The person who filled out that form was instructed to do that so we would not have Mr. White suspicious of the fact that he was under investigation.

Senator COHEN. So that was done to protect the FBI's investigation?

Mr. BENNETT. To protect the internal investigation.

Senator COHEN. Aside from protecting the FBI investigation, doesn't that fact mislead prospective employers?

Mr. BENNETT. Yes, it does, Senator.

Senator COHEN. So you would still maintain, I suppose, that the file should not have consisted of or contained any notice of his eligibility for rehire?

Mr. BENNETT. You mean at that point in time? Yes.

You see, the file is available within personnel itself. We would only want those people who have a reason to know to be involved.

Senator COHEN. To your knowledge, did any Garrett employee provide information to Northrop about Garrett's investigation?

Mr. BENNETT. Not to my knowledge.

Senator COHEN. Senator Levin.

Senator LEVIN. Just two questions, first on Mr. Brown before we get to Mr. White. It sounds like a scotch, B&W, here.

On Northrop's personnel form, if you take a look at exhibit B1, it says that there is a voluntary termination for personal reasons.

Shouldn't that have been corrected in Mr. Brown's case, at least after he was convicted?

Mr. RICHARDSON. Subsequently, after he was convicted, it should have been corrected, that is correct.

Senator LEVIN. Will you correct that now?

Mr. RICHARDSON. Yes, sir.

Senator LEVIN. At the time that he left Northrop, shouldn't you have disclosed—notified the Defense Department, or DISCO, which issues security clearances, to inform them?

Mr. RICHARDSON. They were notified.

Senator LEVIN. They were notified when he left employment?

Mr. RICHARDSON. Yes.

Senator LEVIN. DISCO says that they weren't.

Mr. RICHARDSON. He was on a special program, and the special program security people were notified. They were fully aware of what was taking place.

Senator LEVIN. So that the program people were notified; DISCO was not notified by Northrop?

Mr. RICHARDSON. Not per se. The special program people were notified.

Senator LEVIN. Just the program he was involved in?

Mr. RICHARDSON. The special program security people were notified.

Senator LEVIN. What program are you referring to?

Mr. RICHARDSON. The ATB.

Senator LEVIN. So that is the ATB, the Advanced Technology Bomber?

Mr. RICHARDSON. The program personnel security people were advised.

Senator LEVIN. But you did not advise DISCO?

Mr. RICHARDSON. No, we did not.

Senator LEVIN. Let's go to Mr. White's case.

I think, Mr. Bennett, you really basically put your finger on the problem in a very forthright way. We are grateful for it. The solution is critical, but here it is. You have identified it.

You identified a person who, in your words, is a bad apple and you wanted to get rid of him. You also indicated, even without the FBI request to you relative to nondisclosure, that you would not have disclosed the circumstances of his departure to a future employer under current policy.

You are looking at changes in that policy, but I am talking about current policy because I assume that other companies have similar policies. We know from the overall statistics, as a matter of fact, as to the revolving door here that there are similar policies in effect. So I am not in any way singling you out.

Quite the opposite, I am saying that it is very likely, given these very strong statistics about this revolving door, that many companies follow that policy. That is the bottom line problem—is that we have companies that identify an employee as a bad apple who they want to get rid of, to use your words, but then for one reason or another that information is either not conveyed to the next employer or the next employer doesn't ask.

That, it seems to me, is at the heart of the problem in a very forthright and candid way.

Let me ask you some questions specifically about Mr. White's case. Let me go to Mr. Richardson on this.

I don't know whether you have read, Mr. Richardson, the letter which we received from the attorney for Garrett. Here is what the attorney says about these audiotapes.

Have you had a chance to see this exhibit W-2?

Mr. RICHARDSON. No.

Senator LEVIN. Let me read to you the Garrett attorney's letter to us. The attorney says that, according to one of the audiotapes provided to them, that Mr. White was implicated, in the following: feeding pricing information to a company, being paid by a company one-half of its markup, asking a company for a kickback up front, being given a $700 to $800 wedding present by a different company, being paid 5 percent on orders placed in March 1983 by a different company.

I'll stop there. Well, I'll keep going, in case it's not clear enough. There's also a sworn statement received from another employee that implicated Mr. White in receiving a 5- to 10-percent kickback from that first company, using condonimiums belonging to a third company, using condominiums belonging to a fourth company. That now is on the record in this letter.

Now, this fellow is a buyer from Northrop right now. Now, on the record, you've got these allegations. Is he going to be confronted with these allegations about the way he operated as a buyer at his previous employer?

Mr. RICHARDSON. Is he being indicted?

Senator LEVIN. No. Will he be confronted by Northrop with these allegations now?

Mr. RICHARDSON. I don't think so. I think we will be reviewing Mr. White on the basis of his performance with Northrop. He's not a buyer. He's in the procurement cycle. He is a team member in major subcontracting. He does not make individual decisions. The team makes decisions.

Senator LEVIN. Does he participate in decisionmaking?

Mr. RICHARDSON. He participates as a team member in making recommendations relative to the overall process of buying large systems, but he does not deal with individual vendors, or individual suppliers, or individual contractors.

Senator LEVIN. Does he make recommendations relative to contracts with suppliers or vendors?

Mr. RICHARDSON. Not really. He is a team member, in which his opinion is sought relative to the qualification of the supplier to provide the proper equipment.

Senator LEVIN. All right. So he is giving opinions relative to buyers' qualifications.

Mr. RICHARDSON. Vendors' qualfications, not buyers.

Senator LEVIN. How many are there on the team?

Mr. RICHARDSON. There's at least a half dozen people involved in making some kind of recommendation in this area.

Senator LEVIN. So he's now a member of a team. He is giving opinions relative to qualifications of vendors.

Mr. RICHARDSON. In certain aspects of the system; correct.

Senator LEVIN. Now you have a tape, or you have a transcript of a tape here, which shows that he engaged in extensive kickback activity for his previous employer. Are you saying that he is not going to be confronted with that?

Mr. RICHARDSON. That is not a reason for us to terminate him.

Senator LEVIN. Is it a reason to confront him? This is his behavior. That is the kind of ethics that he had just a few months or a year ago, and you weren't notified of any of that—right?

Mr. RICHARDSON. That's correct.

Senator LEVIN. Would you have hired the guy if you knew about that?

Mr. RICHARDSON. Absolutely not.

Senator LEVIN. But you won't even confront him now that he's on your payroll?

Mr. RICHARDSON. I don't believe it's our place to confront him with that.

Senator LEVIN. If you wouldn't have hired him because of that, shouldn't you at least ask him whether it's true, so that you can determine whether to continue him in a position where he gives opinions on pretty critical issues, to wit, whether or not to deal with certain vendors?

Mr. RICHARDSON. Senator, we're going to be judging this individual as a Northrop employee, and what he does as a Northrop employee.

Mr. BENNETT. Senator Levin, could I add something to this?

Senator LEVIN. Is that true, even if he is indicted for his prior activity?

Mr. RICHARDSON. If he's indicted, convicted, and sentenced he probably would leave the company. If not we would terminate him.

Senator LEVIN. If he were indicted, convicted and put on probation for his prior activities?

Mr. RICHARDSON. I think we would take that into consideration, because there would be substantial proof of wrongdoing.

Senator LEVIN. With a prior employer?

Mr. RICHARDSON. Yes. With a prior employer.

Senator LEVIN. Then you wouldn't just judge him solely on his activity with Northrop?

Mr. RICHARDSON. I think we would be judging him on the basis of how well he performed and how he would continue to perform following that information coming to Northrop in an official manner.

Senator COHEN. What would happen if he, after serving for about 2 or 3 more months on your payroll, decides to walk out and get a better job with Mr. Fragner, and he goes over to TRW. Would anything in his file indicate that he had been under suspicion of wrongdoing with his previous employer, Mr Bennett? In other words, he can walk from Mr. Bennett over to you and get clearance from you after 2 or 3 months, maybe half a year or a year, then walk over to Mr. Fragner, and he's got a clean record for all practical purposes. You're not going to pass on anything but that this guy is an exemplary employee. He did a great job. Then he walks out and he goes back on the procurement line with you, Mr. Fragner. He has, for all practical purposes, purged himself of the problem he had with Mr. Bennett.

Mr. FRAGNER. Yes and no.

Senator COHEN. Tell me the no.

Mr. FRAGNER. The no is that it's conceivable that the next prior employee would be contacted for a reference check.

Senator COHEN. Do you go two back?

Mr. FRAGNER. As I say, it is conceivable.

Senator COHEN. It's not even a practice of really going back to one prior employee, let alone two.

Mr. FRAGNER. In theory, it's possible; in practice, it might not happen.

Senator COHEN. Let me tell you what I think. All three of you have different policies. You're all worried about lawsuits. It would seem to me that if legislation is not the answer, and it may not be the answer, some sort of effort has to be undertaken by the defense industry itself to provide some sort of uniformity, so that you have similar types of procedures for dealing with these kinds of cases.

Mr. Bennett might have a different policy. Mr. Fragner, you might have a different policy. You are being whipsawed and caught in sort of the cross-cut of the liability potential that each of you would suffer. It seems to me one thing that could be done would be to establish some uniformity in practice and procedures regarding these issues. Let the industry itself engage in the policing of it and enforcing of it. It might just provide you with some insulation against these liability suits.

To the extent that an employee who has been let go under suspicious circumstances, and there is a notation in his file which then becomes a part of the record which may be shared among the companies, to the extent each of you have different policies, it seems to me that the employee can hire a lawyer and say:

Look, here's what they've done to me. And I can show that this is not the practice throughout the industry. As a matter of fact, they have engaged in defamatory procedures or procedures that are likely to defame me without due process of law. They don't do it at TRW. They don't do it over at Northrop. And they don't do it at Garrett.

So you get caught in a standard which doesn't exist. But only for your individual firm.

It seems to me one potential insulation against that, and I am sure your attorneys might be in the audience shaking their heads, is that you should at least ought to have the benefit of having some uniformity which would provide a measure of insulation against that kind of liability, so that they then can't point to a different form and say, "it's not the practice throughout the industry." That's just one recommendation I would advise and ask that you take under consideration.

Mr. Bennett.

Mr. BENNETT. Yes. Senator Levin, with respect to Mr. White. Those are all allegations made by others against Mr. White.

Senator LEVIN. The tape recording?

Mr. BENNETT. The tape recording; yes. And to some extent, you know, legalistically, it's hearsay. We never finished the investigation of Mr. White, because the Bureau came in and was doing the investigation. And we don't know what they are going to do about Mr. White, if anything.

Senator LEVIN. But he's a bad apple, and you wanted to get rid of him.

Mr. BENNETT. That's what somebody wanted to do; yes.

Senator LEVIN. You said that your firm wanted to.

Mr. BENNETT. The fact of the matter was that we did have evidence of his receiving favors from a vendor, in one particular instance. What is on those tapes, we don't know where that would have led or is going to lead with the current FBI investigation, for example.

Senator LEVIN. Did I hear you right, when you said that he was a bad apple and you wanted to get rid of him?

Mr. BENNETT. That's what the other gentleman wanted. It wasn't me that said that.

Senator LEVIN. What other gentleman?

Mr. BENNETT. The supervisor.

Senator LEVIN. In your firm? So your firm decided that he was a bad apple, and you wanted to get rid of him.

Mr. BENNETT. Because of that conduct, we had investigated and discovered.

Senator LEVIN. For whatever reason.

Mr. BENNETT. That's right.

Senator LEVIN. You have a bad apple; you want to get rid of him. He ended up in Northrop's lap.

Mr. RICHARDSON. But suppose the individual is innocent—that the allegations turned out to be incorrect and the individual was exonerated.

Senator LEVIN. If he's bad enough for them to get rid of, why should you end up with him, without even knowing it?

Mr. RICHARDSON. We don't know in every case that the individual is guilty. Allegations are one thing. Guilt and proof of allegation are something else.

Senator LEVIN. Folks, there's no use fighting each other or fighting us, I guess. The guy is bad enough that Garrett wanted to get rid of him. You were unaware of that. Surely, you would want to at least consider the information that they thought was significant enough that they wanted to get rid of him as a bad apple. I mean, I'm on your side on this one.

Mr. RICHARDSON. I understand, but Mr. Bennett said he didn't complete their investigation, No. 1. No. 2, they laid him off. They didn't fire him.

Senator LEVIN. In your own words—and these are the critical words—they decided, the people who dealt with him in that company, that he was a bad apple, and they wanted to get rid of him. You've now got him. And didn't know anything about all that when you hired him.

Mr. RICHARDSON. That's correct.

Senator LEVIN. If we can't concede at least that that's a problem, I think we're hiding our heads in the sand.

That is a problem.

Mr. BENNETT. I think Mr. White is also an unusual case. The fact that there was an investigation going on, an undercover, a covert investigation going on at the time, I think he's an unusual case in that regard.

Senator LEVIN. Except, again, the statistics that Ms. Bean told us at the beginning of this hearing, concerning the analysis of the 25 cases which she's done. Some of these statistics are pretty dramatic, it seems to me—of 15 buyers with kickback convictions, 7 have personnel records that don't even mention those convictions. That's way beyond you, you know. You happen to be here this morning. You're not the focus or the target of anything. In fact, you're being helpful by coming forward and sharing information with us. We've got an endemic problem. It may not be limited to the defense industry, by the way. That may very well be true.

Senator COHEN. It is not limited to the defense industry.

Senator LEVIN. But that happens to be what we're looking at at the moment. Both of us happen to be on the Armed Services Committee as well as on this committee. That makes us doubly worried about the implications of this.

I can go on and on in terms of percentages, but 62 percent of the personnel documents have blank entries or incorrect markings relative to employee eligibility for rehire. It just goes on and on. So it's not just an isolated case, where we have that problem.

I don't think I have any questions at this point.

Senator COHEN. Mr. Fragner.

Mr. FRAGNER. John Richardson and I are former chairmen of the Aerospace Industries Association Human Resource Council. That is the same group that sponsored the conference in Los Angeles, I guess, last month. I am currently on the council of the executive committee and Tom Bennett is a member of the council.

I would like to volunteer to bring this matter that you are referring to—is there something the industry can do—to the attention of the AIA Human Resource Council, solicit their interest and on

obtaining the association's approval, work with the subcommittee in trying to define and work out some system. This human resource council has already worked with a number of other congressional committees on different issues. So it is not anything that we're not used to. And the association, in general, has exhibited interest, by sponsoring the conference in Los Angeles.

So I have some degree of confidence that we could solicit membership approval and association approval on that, relatively soon. We also happen to chair the west coast red team for the council on working on issues of this nature.

Senator COHEN. I appreciate that, Mr. Fragner. I hope that you would bring it up before the industry. I've spoken with a number of executives of the aerospace industry. They have expressed to me their concern about what is happening to the image of the aerospace industry today—particularly in view of Gramm-Rudman and budgetary cuts, the space shuttle, SDI, and how this is all going to impact on our national security.

One thing that we've done is to take steps that will help reduce the possibilities—not to eliminate this, but the best we can hope to do is reduce and minimize the possibility of people who are taking advantage of a nonsystem right now.

I mentioned the fact that debarment or suspension was a great problem when we came to this committee. And there was a reluctance on the part of our agencies to adopt any kind of uniformity. OMB was not interested in having a uniform system. Some agencies were for it; others were totally without procedures in dealing with debarment or suspension.

It is not going to come easy, but I think it will provide some measure of protection to the industry, to engage in some degree of standardization of procedures, so that you can feel relatively comfortable that Mr. Bennett is not unloading his bad apples onto Mr. Richardson, and vice versa.

I think it should be in the private sector, at least initially, to see what can be done.

I really appreciate the three of you gentlemen coming forward to give us your testimony. You have all been very helpful.

Senator LEVIN. One additional question to go to Mr. Bennett, Mr. Chairman. I agree with the chairman's sentiments on this. We need the problem cleaned up. Preferably, it should be cleaned up by the industry. It's only if it can't be—it hasn't been yet, obviously—then we need some kind of Defense Department action to enforce the changes necessary.

But Mr. Bennett, I'd like to ask you, just on the second page of your form W–1, if you're familiar with it—that page, as I understand it, is not signed by the exiting employee?

Mr. BENNETT. That's correct.

Senator LEVIN. Yet that page says—question 5: "Should this employee receive favorable consideration for rehire?" Relative to Mr. White, it says "Yes."

Should that form be changed?

Mr. BENNETT. Well, the problem is, the form is available to be seen by others. Others can see this form.

Senator LEVIN. Is he now eligible for rehire?

Mr. BENNETT. I would not think that we would rehire the man.

Senator LEVIN. But the form says that he should receive favorable consideration for rehire, so others looking at this form will get exactly the opposite statement than what you would imply.

Senator COHEN. Even for a justifiable reason, which you have. That is the FBI investigation.

Mr. BENNETT. The form is available to others within the personnel department other than those in the management level of the personnel department to look at, and we were trying to keep this investigation covert until such time as the Bureau allowed us to get back.

Senator LEVIN. The investigation is now over, isn't it?

Mr. BENNETT. I don't know. I don't know whether the FBI has finished its investigation.

Senator LEVIN. Thank you.

Now, I want to add my thanks to all three of you.

Senator COHEN. Thank you.

Our next and final witness this morning is Prof. Theodore St. Antoine, who is the Degan Professor of Law, at the University of Michigan.

Professor St. Antoine, please come forward.

He is an expert in the field of employment law and serves as cochair of the American Bar Association's committee on the development of the law of individual rights and responsibilities in the workplace.

Professor, we are pleased to have someone from the State of Michigan here to participate in these hearings.

Mr. ST. ANTOINE. Good morning. Thank you, Mr. Chairman and Senator Levin.

Senator LEVIN. Could I add a word of personal welcome here. You are a constituent of mine of great fame and notoriety.

Mr. ST. ANTOINE. I worry about that word "notoriety," Senator.

Senator LEVIN. I have unhappily never had the opportunity to learn some law from you, but I wish I had because you have got a wonderful reputation, and all the students that you have had that I have talked to state that you are one of the really fine professors they have ever had.

We are delighted to have you here.

TESTIMONY OF THEODORE J. ST. ANTOINE,[1] DEGAN PROFESSOR OF LAW AND FORMER DEAN OF THE LAW SCHOOL, UNIVERSITY OF MICHIGAN, AND COCHAIR, AMERICAN BAR ASSOCIATION COMMITTEE ON DEVELOPMENT OF THE LAW OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES IN THE WORK PLACE

Mr. ST. ANTOINE. I appreciate that very much.

First, I would like to comment, Mr. Chairman, since you remarked that I have been the public cochair of the ABA Committee on Individual Rights and Responsibilities in the Work Place, that, of course, I am appearing here today only in my own personal capacity and I am not speaking on behalf of any organization.

I do appreciate the opportunity to make this statement.

I have submitted to the subcommittee a written statement with citations, which I hope will be useful. It seems to me that what

[1] See p. 90 for Mr. St. Antoine's prepared statement.

would be most helpful for you right now would be a brief oral summary of my written statement. I won't go at all into detail.

At the outset, I would like to emphasize that I haven't made any kind of study myself of kickback practices in the defense industry and, therefore, I have no opinion one way or the other on the need for any possible, corrective legislation. I am simply offering my own observations as to the possible legal implications of any legislation that you might consider.

Let me start with the employers' concern about lawsuits and possible causes of action that might be available to employees or job applicants because of information exchanged among employers.

This is a rights-conscious age. It is a litigation-obsessed age. Even law professors get sued. I have been sued by irate students who were dissatisfied with their grades. [Laughter.]

Everybody can be sued.

Senator LEVIN. Those were not the students I referred to in my comments. [Laughter.]

Mr. ST. ANTOINE. In any event, that is part of the cost of being in a civilized society. I must say I sympathize with the employers. It seems to me, however, that in terms of responsible action by legislative bodies we have got to look at what the results of those cases would be.

There are about half a dozen different arguable causes of action that employees or job applicants might bring on the basis of references concerning them or inquiries made of them—defamation, the intentional infliction of emotional distress, interference with economic advantage, invasion of privacy, and on several different grounds, antidiscrimination legislation.

Let me say a word about that last, a quite important possible basis of suit. There are, of course, both State and Federal laws forbidding discrimination against either employees or job applicants because of race, sex, religion, national origin, and the like. The laws have been interpreted to forbid action in which a disproportionately adverse impact upon a protected group may occur because of certain inquiries or decisions, regardless of the employer's innocent intent.

For example, it is a statistical fact that blacks are more likely to be arrested than white persons and, therefore, it has been determined by the EEOC and the courts, that a decision not to hire someone simply on the basis of a prior arrest record is a violation of title VII of the Civil Rights Act.

Inquiries with regard to prior arrest records are looked upon by the EEOC as forbidden in and of themselves. That is not necessarily the position the courts have taken, but EEOC has taken that position in the past.

Even convictions have to be examined rather closely. Blacks again are more likely to have been convicted of crime than whites.

Consequently, whenever a conviction is the basis for the denial of a job, there ought to be some demonstration of the relevance of the particular type of conviction to the job sought. For example, it wasn't a peaceable civil rights demonstration on private property, but some kind of crime involving violence or dishonesty that might bear a relationship to the actual duties on the job to be undertaken.

In short, antidiscrimination legislation is definitely in the picture and ought to be taken into account.

The right to privacy generally has been rejected by the courts as a cause of action on the basis of the exchange of information between private employers.

We should note, however, that if you legislate certain mandatory conditions for Government contractors in the terms of their selection process, then a new element enters the picture. That is the constitutional protection afforded individuals against governmental action. Such constitutional protection does apply against private action that is mandated by Government. The right to privacy, of course, has become one of the constitutional rights that the Supreme Court has recognized with regard to governmental activity.

Therefore, I would get uneasy if you were to mandate either inquiries or releases that go so far as to speak of "all information, whether personal or otherwise," as it is worded on one of these forms included among the subcommittee exhibits.

So if Government gets involved, the right to privacy becomes significant in a way that it has not been in the past when there were only private employers' voluntary inquiries.

With regard to defamation—and in fact I think I can lump together the rest of these categories—defamation, the intentional infliction of emotional stress, interference with economic advantage—for all of those possible causes of action, as I read the cases, the courts across the country have established very stiff standards. In effect, they have recognized a qualified privilege.

As long as an employer has not acted maliciously, has not acted without a legitimate justification for the inquiry in the first place or for the response to the inquiry in the second place—I repeat, as long as there is no malice, as long as there is a legitimate need to know—then there is a qualified privilege in inquiries and responses concerning information relevant to the decision whether or not to hire a person.

Thus, I truly believe that employers, for the most part, have been too timid, too reticent in their handling of reasonable inquiries. So far as the law is concerned, they are ordinarily immune to liability. They are simply taking the easy way out in providing nothing but the practical equivalent of name, rank, and serial number when asked about a current or former employee.

I believe that upon receipt of a legitimate inquiry—and certainly a prospective employer has a need to know—the former employer is entitled to provide any relevant factual information, not a mere subjective suspicion but any relevant factual information.

I will be very broad. As to the kind of information sought, my statement covers almost everything that you have asked about this morning. As long as there is no malice, as long as there is a legitimate need to know, that sort of factual information can be made available.

Certainly, that includes pertinent convictions, personal knowledge that has come to a manager's attention as the result of an in-house investigation, and I would even go so far as to add the mere existence of an FBI investigation as long as that is stated in a wholly neutral fashion.

Obviously, there is a strong desire to maintain the integrity of the employee, not to slander him or her. One would, therefore, not wish to anticipate the findings and conclusions of an incomplete investigation.

Senator COHEN. What if the person is black who is under investigation? How does that fit in with your antidiscrimination statute?

Mr. ST. ANTOINE. Senator, I find that intriguing. It is prior arrest records, prior convictions that trigger the concern about blacks being disproportionately subject to arrests and convictions.

It seems to me, however, that as long as one is not talking about an arrest record or a conviction record, in general, as long as you are talking about something that arises on this particular job, the antidiscrimination principle should not apply. Its concern is the inquiry on an application form: Have you ever been arrested for anything other than a traffic arrest? That opens up everything in a person's life, theoretically.

On the other hand, reporting to a prospective employer that this person is now under investigation for suspected theft by the FBI or whomever doesn't speak randomly about any kind of investigation but quite specifically about a particular investigation regarding this person's current employment.

I think that falls in a different category, but I do concede there is perhaps a little illogic in my approach. Nevertheless, I feel the specificity of a particular ongoing investigation would make a big difference.

Let me conclude with some observations about the legislative course you might take. Again I should emphasize that I am not proposing legislation of any sort because I simply don't feel that I have a sufficient background in the problems of the defense industry.

Generally speaking, for a matter of this kind I do not believe criminal sanctions would make sense. It is true that criminal activity is your ultimate target, but nonetheless what you would be addressing directly is a pretty mundane, workaday process of employee selection. I don't think one ought to add criminal sanctions as a further burden on that process.

My feeling is that a well-tested device, and a very effective device in trying to achieve certain policy objectives, is the use of conditions in contracts. If you were to move in this direction, I would suggest that you require or authorize the insertion of conditions in Government contracts establishing certain minimum standards in the employee selection process. My own recommendation would be for you to direct or authorize the Department of Defense to work out the details of the program through regulations.

I, at least, have not heard any testimony from the Department of Defense concerning their views on all of this. In any event, if you should go the departmental regulation route, I think that you would have much more flexibility. DOD could provide for the tailoring of the contractual conditions to particular industries rather than have identical conditions cover the entire Defense Establishment. Regulations would also be subject much more readily to amendment in light of experience, and so on.

It would seem to me that the kinds of conditions that have been imposed in many different Government contracts with regard to

minimum labor standards, which is the area I am most familiar with, would be a very good model.

Senator COHEN. What about the issue of constitutional protection now being injected into the private domain?

Mr. ST. ANTOINE. You are absolutely right. Constitutional protections would apply. That is one of the tradeoffs.

It seems to me that you have got to consider how great a need there is. I frankly think, however, that the constitutional problems would not be as great as the cost in terms of time and money of the Defense Department's having to administer this.

Obviously, it would be preferable if the private sector could clean up its act on its own. But if you must move in, I think these practical aspects would be a more serious matter for consideration than the law.

This would be an enormous program. If it is going to be effective, it would take a good deal of monitoring, it would take a lot of time and money to get down to the actual process of screening millions of employees throughout the United States.

But that is much more a practical problem. Frankly, I think that is the real problem for you. I do not think that the law, as it now stands, is any barrier to the kind of full disclosure that you are seeking.

Senator COHEN. As a hypothetical matter, would it not be in the defense industry's interest to have Congress authorize the establishment of a procedure to get uniformity of certification, disclosures, and so forth. The industry would then have the protection of going to the court and saying, "We didn't want to do it, but the Congress has mandated this, and therefore we are not liable?"

Mr. ST. ANTOINE. I would think so, but of course they are the ones best able to respond to that. It is always a benefit to be able to blame someone else for forcing you to behave.

I remember the AFL–CIO telling the Congress we need a Civil Rights Act because we need to be able to tell our members that they cannot be parties to racial discrimination. We need the Federal Government to help us do good.

I might just supplement that by responding to a query that was included in the subcommittee's letter of invitation to me.

I would not think that it would be wise for Congress to try in any way to codify or, even worse in my judgment, to rewrite the States' common law with regard to privileged disclosures. It would be entirely adequate if the Department of Defense, pursuant to statutory authorization, simply put these conditions in Government contracts.

Then, the particular parties to those contracts, all the various defense contractors, would have the protection they need. That would be Federal law enacted pursuant to the spending power. It would certainly prevail over any State law to the contrary.

That, it seems to me, would be entirely adequate, and it would be quite unnecessary to engage in any broad brush effort to rewrite the law in a realm that traditionally has been left to the States.

Senator COHEN. You were here during the course of the testimony by the gentlemen representing the various companies.

One of the questions that was asked is the adequacy or the effectiveness of a waiver. Mr. Bennett talked about the possibility of

getting a waiver from an employee and yet expressing grave doubts on the advice of counsel as to the effectiveness of insulating them against liability, even where the employee signs a waiver saying, sure, go ahead, go back and check all you want during the investigation.

What is your assessment? Is that a legitimate fear, or should they get a new counsel and hire you? [Laughter.]

Mr. ST. ANTOINE. I think they have good counsel, Senator. I am sorry, this is something I meant to touch upon, and I am afraid it simply slipped my mind.

As I indicate in my written statement, there is hardly anything more hazardous to generalize about than the law regarding releases. It is my opinion that the courts give a great deal of attention to releases when the release is in accord with what the courts think is decent and fair, and they ride right over them if they feel that somebody has been pressured into a release or doesn't know what he or she is signing.

Senator COHEN. You have just been wheeled into the emergency room at the hospital?

Mr. ST. ANTOINE. That is exactly the example I provide.

I, therefore, think that releases here are not going to add a great deal in the way of a defense that wouldn't be available to the parties, anyway.

I would think, however, that a court is going to be very sympathetic to employers in these circumstances. Thus a release would be relied upon to support the position that may very well have been reached even without it.

For example, a number of companies in their job applications insert a little provision to the effect that any employment that results from this application will be terminal at any time at the will of the employer without any reason given.

That is in accord with the longstanding traditional doctrine of employment at will. It fits in with the courts' preconceptions.

Now, our progressive State of Michigan, along with a number of other States, has made inroads into the doctrine of employment at will in the last few years. The courts have held that in certain circumstances an employer's assurance to an employee that it is not going to discharge him without good cause is legally binding.

But, nevertheless, that same State of Michigan, at least in one of the Federal district courts purporting to interpret Michigan law, upheld a release of the sort that I have just mentioned. The judge, who happens to be a former faculty member at the University of Michigan Law School, declared that that release was entirely appropriate and that it simply made clear to the employee that he was only entering into a contract terminable at the will of the employer. Other courts have ruled the same way.

My judgment is that releases concerning employer inquiries and disclosures would generally be accepted by the courts as additional confirmation of the understanding of the employees.

So I think they would add a little weight, but not a great deal.

Senator COHEN. I would like to ask one further question, as a student of yours, for the moment.

Senator Levin and I are concerned about the number of leaks coming out of the Government, and certainly, about what's going

on in terms of spying activities in the private sector, as well. The question came to my mind, as I was listening to you talking about the intervention of the Federal Government and the sort of potential problem it might create in the way of protections against privacy.

If it is the policy within the industry to have their employees take a lie detector test, does that raise a problem of invasion of privacy?

Mr. ST. ANTOINE. Yes. I really think it does.

Senator COHEN. If it is not mandated by the Defense Department, it's solely a practice within the industry, saying we've got a serious problem here. We're dealing with top secret and above-top-secret classification. We want to be sure of protecting that. Therefore, we have a policy of polygraphing our prospective employees.

Is there a constitutional issue, since the Federal Government is not involved?

Mr. ST. ANTOINE. There isn't a constitutional issue, as long as the Federal Government is not involved. But in about half the States at the present time, there are even prohibitions on the use of polygraphs in connection with employment or very stiff limitations on their use.

Senator COHEN. If we, at the Federal level, in Congress or through Executive order should mandate the employment of lie detector tests, does that raise the privacy issue?

Mr. ST. ANTOINE. Yes. It seems to me, on the one hand, it would override the State law to the contrary, but it would then raise a constitutional question. I really don't feel at all comfortable in expressing an opinion on how that would come out. I think the polygraph in most legal circles is regarded with great skepticism. Most courts, for example, will not accept testimony regarding the use of a lie detector.

Senator COHEN. It may be regarded with great skepticism out in the private world, but it's being raised rather heartily by the Department of Defense.

Mr. ST. ANTOINE. There's an enormous difference in the range of opinion about the value of the polygraph.

Senator COHEN. It's off the mark of these hearings, but I was intrigued with your suggestion, once we step in about mandating certain standards, then we've got another constitutional problem. Senator Levin.

Senator LEVIN. Thank you, Mr. Chairman. I just wanted to read a couple of paragraphs to highlight them and then ask a couple of questions.

I think all the testimony has already been made part of the record, but on page 4, you indicate that in your opinion, "many employers today are much too timid and reticent when faced with legitimate inquiries about former or current employees. The established case law simply does not justify the position that they should confine their responses to the practical equivalent of name, rank, and serial number. The courts are practical bodies and appreciate the need for fair and honest evaluations of prospective employees, especially those entering sensitive decisionmaking and policymaking positions.

"Too many employers, I believe, may simply be taking the easy way out in failing to pass on information that any responsible person would regard as relevant to any future selection process.

"To the extent that practice exists, I consider it outright shirking of an employer's obligation, civic if not legal, to the business community and the larger society".

And then in paragraph 4, you say with respect to the reasons for an employee's departure:

> In keeping with the views I have just expressed, I would conclude that a prior employer could not reasonably be sued for defamation—either slander or libel—or for invasion of privacy because it accurately disclosed to a prospective employer, one, the reason for an employee's departure, and two, the employee's eligibility for rehire.

Now I would just like to ask you a series of questions and see if you're able to give us answers similar to what you just indicated in paragraph 4.

Without incurring an unreasonable risk of civil ligitation, could an employer reveal in a factual, neutral way to a perspective employer, that a former employee was fired?

Mr. ST. ANTOINE. Yes.

Senator LEVIN. That the employee was fired for unethical conduct?

Mr. ST. ANTOINE. Yes.

Senator LEVIN. That the employee had been asked to resign, because he or she was under suspicion of taking kickbacks?

Mr. ST. ANTOINE. I think, yes, Senator. I do think, however, that it probably is important that there be full disclosure of those circumstances, that there be some indication of the actual facts that gave rise to that suspicion.

Senator LEVIN. That the employee had been suspended from his job, pending an investigation into unethical business practices?

Mr. ST. ANTOINE. The same answer.

Senator LEVIN. That an employee resigned shortly after being confronted with allegations of unethical conduct?

Mr. ST. ANTOINE. I think all through this the important element is to make sure that you don't have an accusation in the air, simply the bare accusation, but provide some factual support for it.

Senator COHEN. Can you stop there?

He had resigned on being confronted. I assume the employee doesn't come in and say, "Yes, I resign. My wife is dying of cancer, and I didn't have an opportunity to marshal a defense or the resources to marshal a defense against these unwarranted allegations."

Would you still that company would be free from liability under those circumstances?

Mr. ST. ANTOINE. Well, I want to be as generous as I can to the company. I think that almost anything that is said without malice and in response to a legitimate inquiry should be regarded as privileged. That is really my ultimate position.

I would even say that that applies to expressions of opinion. But to be cautious about it, I think an employer would be much better providing some supporting evidence behind the accusation and not merely reporting the existence of the accusation. After all, there

are lawsuits, and every judge and every jury doesn't necessarily come to a reasonable conclusion.

Senator LEVIN. There's a number of other gradations of those questions that I would like to have you comment on, perhaps for the record, if I could send them to you. There are many, many gradations. Would you be able to give us your response in writing,[1] so we could consider it?

Mr. ST. ANTOINE. I'd be happy to, Senator. You do appreciate my general approach is going to be the same all the way through. As long as there is no malice, as long as there is a legitimate basis for the inquiry, I think the answer should be regarded as privileged. Indeed, the ABA quotation that I provided in my statement suggests that you don't need anything more than an expression of opinion or a factual presentation, even if it isn't solicited.

By that, I take it that they are talking about a good-faith presentation. It may turn out that the "facts" were erroneous. In my judgment, however, the employer appears in a better light when he doesn't simply communicate a subjective accusation without any indication of the reasons that gave rise to it.

Senator LEVIN. In the final paragraph of your statement, you get to the question of what's the remedy. You suggest that any legislation that might be adopted, "be of the directive or authorizing variety, not attempting to spell out all the details of any set of contract conditions regarding employee selection procedures, but delegating that function to the Department of Defense."

From your testimony, I gather, you would prefer the authorizing variety to the directive variety.

Mr. ST. ANTOINE. No, I'm really leaving that to your judgment. I don't feel qualified to make that determination. My emphasis was on my preference for leaving the details to be worked out in departmental regulations.

Senator LEVIN. So you don't have any preference between our directing the DOD or authorizing the DOD to come up with the contract provisions which would try to get to this problem?

Mr. ST. ANTOINE. Not on the basis of my knowledge of the problem.

Senator LEVIN. Thank you very much, Professor.

Senator COHEN. Thank you, Senator Levin.

Professor, we'll be sure to see to it that Mr. Fragner and others receive copies of your responses to Senator Levin, so they will have the benefit of your counsel, free of charge. [Laughter.]

Senator LEVIN. You don't mind if we send the bill in our name. [Laughter.]

Mr. ST. ANTOINE. If that doesn't get into any kind of defense kickback problems.

Senator LEVIN. We'll give you a privilege, a qualified privilege.

Senator COHEN. We stand adjourned.

Thank you.

[Whereupon, at 12 noon, the hearing was adjourned.]

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[1] See p. 95.

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

STATEMENT OF

ELISE J. BEAN, MINORITY COUNSEL

BEFORE

SENATE SUBCOMMITTEE ON
OVERSIGHT OF GOVERNMENT MANAGEMENT

JUNE 11, 1986

Good morning. My name is Elise Bean. I am an attorney-investigator with the Minority Staff of the Senate Subcommittee on Oversight of Government Management. I am here to testify on the results of an investigation conducted by the Subcommittee staff over the past three months into the allegation that defense prime contractor employees who have been fired or have resigned from their positions in subcontract procurement because of convictions or strong suspicions of taking kickbacks are able to find comparable jobs with other defense contractors.

In the course of this investigation, the Subcommittee contacted 16 defense prime contractors, including Ford Aerospace, Garrett, General Electric, Hughes Aircraft, Lockheed, McDonnell Douglas, Northrop, Rockwell, Singer, Teledyne, and TRW. We collected information on 25 prime contractor employees who have been convicted or were strongly suspected by their employers of taking kickbacks from subcontractors during the last five years. Most of these individuals were buyers or supervisors in procurement departments. For the sake of clarity, I will refer to them just as buyers.

The investigation confirmed the existence of a "revolving door" for these corrupt buyers. By "revolving door," I mean a situation in which a buyer leaving one defense prime contractor under suspicion of wrongdoing is able to find a new procurement position with another defense firm. The investigation also confirmed that poor industry personnel practices, namely the failure by defense prime contractors to exchange accurate and relevant employment information about

buyers, facilitated these buyers' movement from one company to the next.

The Revolving Door

I would like first to describe some of the evidence we gathered on the existence of the buyers' "revolving door." Of the 25 employees we studied, 15 had been convicted of taking kickbacks. The remaining 10 were strongly suspected by their employers, but had not been indicted or convicted on kickback charges. At least 4 of the 25 buyers are currently employed in the defense industry. We also found that 22 of the 25 suspect buyers possessed at some time confidential, secret or top secret security clearances from the United States Department of Defense.

Of the 25 buyers we studied, we confirmed that more than one-third, or 9 individuals, had left their companies under suspicion of taking kickbacks and found new jobs as buyers with other defense prime contractors. Our information suggested that 5 additional buyers were similarly situated, but we chose to focus our attention on the first nine.

Of these 9 buyers, more than half were caught or strongly suspected of taking kickbacks during their employment with the subsequent defense contractor. Two of the nine were suspected of taking kickbacks at each of three firms. One individual had been convicted in 1983 for taking kickbacks, yet was able in 1984 to find another job as a buyer with a major defense contractor. He resigned that position only after a subcontractor reported him for soliciting kickbacks.

Two Case Histories

Today's hearing is focusing on two buyers who serve as good examples of the 25 cases the Subcommittee staff has investigated: "Mr. Brown" and "Mr. White." The names of these buyers have been changed to protect their privacy.

To facilitate discussion of these case histories, I would like, at this time, to ask the Chairman to place two sets of documents into the hearing record. The first set contains documents related to Mr. Brown; these documents are marked Exhibit B1 through Exhibit B11. The second set contains documents related to Mr. White, and the documents are marked Exhibit W1 through Exhibit W3. These documents will help to illustrate the personnel problems associated with the case histories.

Mr. Brown is a 20 year employee of the defense industry, who has worked for a number of defense prime contractors. In 1984, he was working for Northrop as a procurement administrator of the Stealth bomber program. In September 1984, a grand jury investigating kickbacks served a subpoena on Northrop asking for materials associated with Mr. Brown. Northrop placed Mr. Brown on suspension and initiated its own audit of his activities. Two weeks later, Mr. Brown resigned.

Despite the ongoing grand jury and company investigations and his job suspension, in two months, Mr. Brown found a new procurement position with TRW in Colorado. Five months after being hired by TRW, he was indicted for taking kickbacks while at Northrop. On August 26, 1985, he pleaded guilty to the charges. Mr. Brown is now serving a three-year prison sentence.

Mr. White is another 20 year employee of the defense industry. He spent most of his career with Garrett Corporation, compiling glowing job evaluations at every post he held. In March 1985, however, Garrett Corporation began to suspect that Mr. White, then a buyer, was involved with kickbacks. Garrett eventually obtained audio tapes and a sworn statement implicating Mr. White in kickback schemes with half a dozen subcontractors. Garrett contacted the FBI which also launched an investigation. Before the investigations were complete, however, the program that Mr. White was working on ended, and he is recorded as having been "laid off" due to program termination.

Within a month after his departure from Garrett, Mr. White applied for a job with Northrop Corporation. Northrop telephoned Garrett's personnel office and its security department, on separate occasions, to gather information about Mr. White. Neither department told Northrop about the company's suspicions or about the ongoing Garrett and FBI investigations. Northrop has indicated that the only information that was supplied was Mr. White's job title, salary and dates of employment. Based upon favorable recommendations provided by three other persons, Northrop decided to hire Mr. White as a senior buyer. Mr. White was thus able to find a new procurement position with a major defense contractor, despite ongoing Garrett and FBI investigations raising serious questions about his integrity.

Approximately three months after Mr. White was hired by Northrop, Garrett fired 13 buyers for taking kickbacks. Northrop heard rumors that Mr. White had been involved in the kickback schemes at Garrett and reviewed his procurement position. Northrop did not

confront Mr. White with the rumors, but reviewed his position with the company. Northrop decided to keep him in his present procurement position, but to instruct his supervisor to monitor his actions. Mr. White remains a buyer at Northrop today.

How does this happen? Do employers knowingly fill their procurement positions with individuals suspected of kickback activity? The Subcommittee investigation indicates that defense prime contrators do not knowingly hire suspect individuals. Instead, major flaws in the industry's personnel practices allow these situations to occur.

Looking again at the examples of Mr. Brown and Mr. White, the inadequacies are apparent.

In Mr. Brown's case, his Northrop separation notice, marked Exhibit B1 in the hearing record, states that he quit for personal reasons; it never mentions his job suspension or the grand jury investigation for possible kickback activity. The same is true about his resignation letter, which has been marked Exhibit B2. In fact, there was little in Mr. Brown's Northrop personnel file that would alert a reader to the company's suspicions about his misconduct. Documents that would tell the story, such as those marked Exhibits B3 and B4 in the hearing record, were filed elsewhere, in Northrop's security department, and were not referenced in Mr. Brown's personnel file.

In searching for a new job, Mr. Brown did not himself disclose his job suspension or the ongoing investigations. To the contrary, in the letter he sent to TRW, he stated that he was looking for a new job because he wanted to relocate to a cleaner environment. This letter has been included in the hearing record as Exhibit B5.

TRW's files indicate that it attempted to confirm this information by forwarding a questionnaire to Northrop and by telephoning one of the references provided by Mr. White. Northrop did not, however, answer the questions asked. Instead, it sent TRW a computer printout providing Mr. Brown's job title, salary and dates of employment. The printout did not indicate why Mr. Brown left or whether he was eligible for rehire, and TRW apparently did not attempt to obtain the missing information from Northrop. The reference explained Mr. Brown's job change as the result of a desire to "get out of California." Thus, TRW failed to learn, prior to hiring Mr. Brown, about his job suspension, the ongoing FBI, grand jury and Northrop

investigations, and the evidence that Mr. Brown may have taken kickback from suppliers.

The documents demonstrating this exchange of information have been placed in the hearing record as Exhibits B7, B8 and B9, respectively.

In the case of Mr. White, Northrop was similarly unsuccesful in obtaining useful information from his former employer. Neither the personnel office nor the security department at Garrett disclosed the real reason Mr. Brown was laid off, which was the company's belief that he had engaged in unethical business practices. Neither revealed to Northrop the ongoing Garrett and FBI investigations.

Moreover, Mr. White's personnel file presents a flattering picture of his employment with Garrett. It contains no references to the investigations and, at the same time extremely damaging reports were being collected by the security department, the personnel department recorded yet another glowing evaluation of Mr. White's job performance. Another document in the personnel file entitled "Exit Interview Results" -- which has been placed in the hearing record as Exhibit W1 -- describes Mr. White as having a "good" attitude toward the company and his job and recommends "favorable consideration for rehire."

These remarks are from the same company which, in response to our questions about kickbacks, reported a litany of allegations compiled by their security department accursing Mr. White of taking trips, gifts and cash payoffs from numerous Garrett subcontractors. Garrett's written description of Mr. White's possible kickback activities has been placed in the hearing record as Exhibit W2.

The deficiencies in the personnel files of Mr. Brown and Mr. White are representative of the generally poor internal recordkeeping practices of the prime contractors in the 25 cases we studied. For example, of the 15 buyers with kickback convictions, 7 of them have personnel records that do not mention their convictions. Similarly, 22 of the 25 buyers have been subjected to one or more company investigations, yet 7 of the 22 have clean personnel files that make no mention of an investigation. Of 33 personnel files reviewed by the staff (some of the 25 buyers had personnel files with more than one company), 17 had little or no information documenting the company's suspicions regarding the employee's misconduct. This lack of documentation suggests that personnel offices may be unaware of important investigations being

conducted by security departments or outside investigators, even after these investigations have been concluded.

The staff noted two particularly poor areas of recordkeeping affecting the accuracy of employees' separation documents. In 21 personnel files which contained separation documents asking whether the employee could be rehired, 13 or 62% of these documents left the entry blank or incorrectly marked the employee as eligible for rehire. In 31 instances where an employee had left a company under suspicion of taking kickbacks, 18 of the separation documents, or 58%, contained no specific reference to unethical conduct as the reason for the employee's departure. Such crucial items as an employee's rehire status and reason for leaving should be recorded accurately and completely, but in most of the personnel files we studied, they were not.

The personnel files also demonstrated that companies did not readily seek or obtain information about job applicants for buyer positions. For example, the Subcommittee staff found that in 22 of 35 personnel files reviewed, there was no evidence that the prospective employer had contacted a job applicant's prior employer for information on the employee's job performance and reason for leaving. Even worse, in at least 4 of the cases reviewed, the prior employer supplied wrong or misleading information about the job applicant's performance, reason for leaving or eligibility to be rehired.

Finally, the staff noted that employers who suspected their employees of misconduct often allowed these employees to resign rather than fire them. In 28 of the cases in which an employee left a company under strong suspicion of misconduct, 15 resigned. That means that only 46%, less than half, were discharged.

That concludes my prepared statement on behalf of the Subcommittee staff. I would be happy to answer any questions about the Subcommittee's investigation.

WRITTEN STATEMENT

TO THE

SENATE SUBCOMMITTEE ON OVERSIGHT

OF GOVERNMENT MANAGEMENT

* * *

HEARINGS ON

SUBCONTRACTOR KICKBACKS

SUBMITTED BY THE GARRETT CORPORATION

June 9, 1986

THOMAS F. BENNETT

VICE PRESIDENT, HUMAN RESOURCES and ADMINISTRATION
THE GARRETT CORPORATION
LOS ANGELES, CALIFORNIA

Mr. Chairman and Members of the Subcommittee, Garrett Corporation appreciates the opportunity to provide its views on what has become known as the "roving buyer" issue. I am pleased to be here today to testify on behalf of Garrett Corporation in response to the Subcommittee's request. I am Thomas F. Bennett, Vice President of Human Resources and Administration of The Garrett Corporation of Los Angeles, California.

We understand that the hearing will focus on allegations that persons who resign or are fired from one defense prime contractor under suspicion of taking kickbacks are nevertheless able to find new employment in similar jobs with other defense contractors. The Subcommittee has identified "buyers" as particularly prone to the temptation of taking kickbacks and observes that unethical buyers may transfer from one contractor to another without the hiring contractor's knowledge of the individuals' past improprieties. The Garrett Corporation understands that such allegations raise questions about industry personnel practices as a whole, including existing procedures in the industry both to terminate persons suspected of unethical business practices and to screen job applicants for instances of past misconduct.

The Subcommittee has inquired what procedures and policies our company follows when providing job information and references to a prospective employer concerning a current or former employee, in particular when that employee has engaged in or is

suspected of having engaged in unethical business practices. Upon receipt of a pre-employment request from another company relating to a current or former employee of Garrett, the company's policy has been to provide information on the hire date, the termination date, and the employee's last job description. Garrett does not make a policy of providing information regarding why the individual left or will leave Garrett or regarding the individual's performance while at Garrett.

In addition, Garrett complies with the Dept. of Defense Industrial Security Program (DoD Manual 5220.22-M) which requires a report to be submitted to the office tasked with overseeing security clearances, DISCO, whenever the company obtains any information that reflects adversely on the integrity or character of an employee who has been cleared by DISCO to see classified information. Garrett will not normally share this information with non-Government or other private parties.

Garrett presently is considering the adoption of a new policy on disclosure of employee work history as a result of Garrett's concern about the "roving buyer" problem. The policy under consideration would permit Garrett to advise prospective employers who submit a release signed by the employee of the specific reasons why the employee was discharged for unethical conduct, for example, for conflict of interest. This policy would only apply, however, in those circumstances in which, after

investigation by the company, the employee is confronted by Garrett with evidence supporting allegations of unethical conduct and the employee admits those allegations. If, on the other hand, Garrett's investigation uncovers evidence sufficient to support an involuntary discharge for unethical conduct, but the employee refuses to admit the allegations, Garrett will disclose only that the employee is "not eligible for rehire." Garrett believes that advising prospective employers that an individual is "not eligible for renire" will put that prospective employer on notice that it should further inquire into the individual's employment background. Even under this proposed new procedure, Garrett Corporation will not be prepared to release more information than specified because of concerns about employee lawsuits.

The Subcommittee has also inquired what procedures and policies Garrett follows when obtaining references from other companies or individuals concerning prospective employees, in particular how we screen for past unethical business practices. Garrett currently makes and will continue to make specific inquiries of prospective or new employees' former employers to discover past conduct which might indicate the individual was not sensitive to a possible conflict of interest. These inquiries require a signed release by the new or prospective employee. A sample of Garrett's inquiry form is provided at Attachment A. The applicant signs a statement authorizing the company or person named to give "any and all information regarding my employment,

also any other information, whether personal or otherwise, that may or may not be on your records." The applicant releases the person and the company providing the evaluation "from all liability for damage whatsoever that may issue from furnishing this information." The form specifically asks for the reason the employee left and whether the employee is eligible for rehire. Garrett Corporation believes that obtaining the information in written form is the best assurance of its accuracy and completeness. Because it is not the policy of Garrett Corporation to itself provide any information relating to an individual's employment orally, Garrett personnel do not normally make oral inquiries into an individual's employment history.

The Subcommittee has asked what legal restrictions provide the basis for our practices and procedures. Garrett has adopted a restrictive policy, as set out above, because of its exposure to lawsuits by some former employees who might allege defamation or invasion of their privacy if Garrett were to release more information. In addition, Garrett has also been concerned that providing more information than the individual's date of hire and termination and his or her job description could cause some employees to bring suit against the company for violating California's "Blacklisting Statute" (Cal. Labor Code §§ 1050-1056), which prohibits an employer from using misrepresentation to prevent or attempt to prevent a former employee from securing a new job.

Garrett recognizes that a qualified privilege exists under common law defamation and statutory law on invasion of privacy for communication of relevant information between interested parties. The rationale for this privilege is that the interest of the communicator and the receiver outweighs the interest of the individual affected by the communication, when the parties have a legitimate interest in the information communicated. See Restatement (Torts) 2d. §594 and Cal. Civil Code §47. Accordingly, no liability should be imposed even if the information communicated is false if it is made to another with a legitimate interest in the information, the communication is not prompted by malice, and the former employer has a reasonable basis for believing the truth of the communicated information. The California statute, in seeking to protect individuals from "blacklisting" by former employers, also apparently adopts (at Cal. Labor Code §1053) the qualified privilege which is applied in both defamation and invasion of privacy law.

Nevertheless, the fact that the law provides a defense obviously does not protect an employer from the often high cost of defending a lawsuit. Even when a lawsuit is frivolous and subject to dismissal on motion, the plaintiff is usually entitled to discovery, which may be very expensive for the company. For this reason, circumspection in providing information to a prospective employer is quite appropriate.

The Subcommittee has inquired into the procedures and policies our company follows in the event we strongly suspect an employee of taking subcontractor kickbacks. In particular, the Subcommittee has expressed an interest in whether we will terminate the employee or allow him or her to resign, and the Subcommittee is interested in what explanation Garrett will provide on the employees' official separation documents. Because the Subcommittee has indicated that it desires us to focus on a particular case, we shall outline the investigative procedures and termination policies we follow when we have reason to suspect an employee of taking subcontractor kickbacks and gratuities on the basis of his particular case. In order to protect his privacy, we shall refer to him hereinafter only as "Mr. White".

Mr. White worked as a buyer for Garrett and had been employed in that position for a number of years. In early 1985, it came to the attention of Garrett that Mr. White may have been receiving hotel accommodations and other items and services from one of our vendors. Garrett's legal counsel promptly asked the security department of the company to look into these allegations, and an outside investigative agency was hired to determine whether there was any basis for the allegation. Coincidentally, within a few days a vendor alleged that Mr. White, as well as other Garrett employees, was involved in activities which would be incompatible with Garrett's stated policy prohibiting conflict of interest. Garrett promptly

referred all its information to the FBI. Garrett pledged full cooperation with the FBI in its conduct of the investigation and, at the FBI's express request, suspended its internal investigation of Mr. White and did not undertake an investigation of the other implicated employees. When the opportunity to lay off Mr. White arose because of the completion of the contract on which he was working, Garrett terminated him. With the understanding and concurrence of the FBI, Garrett did not reveal to Mr. White the other reasons it had for terminating him in order to protect the FBI's undercover investigation. When the FBI concluded the covert stage of its investigation and began openly interviewing Garrett employees, the company requested, and was allowed, by the FBI to undertake a full investigation of its own. Because Mr. White had already been terminated and because several other individuals employed by the company had been implicated, the company decided to focus on investigating possible improprieties of its current employees. This investigation was concluded in late 1985, and resulted in reprimands and the termination for conflict of interest of several other employees.

When an employee at Garrett is terminated, an Employee Status Notice is prepared and shown to the employee. A copy of this document is attached for your information at Attachment B. The precise reason for the termination is normally spelled out in the Remarks Box. On Mr. White's Employee Status Notice dated in

the summer of 1985, the reason for termination was designated "lay off" in order not to give him any indication that the FBI was then engaged in a covert investigation of him and other individuals at the company for receiving kickbacks or gratuities. However, the Employee Status Notices of the employees terminated in late 1985 noted that they were "Discharged for Conflict of Interest."

Accordingly, consistent with its demonstrated previous policies, Garrett will thoroughly investigate all allegations of unethical conduct, including receipt of kickbacks. Depending on the case, Garrett may also conduct an investigation even if the suspected employee has left Garrett. Garrett will document all findings and all conclusions based upon those findings and refer its information to the appropriate government agencies, if indicated.

Garrett Corporation does not recommend federal legislation imposing standard hiring practices or particular forms and reporting procedures on industry. We recognize that the "roving buyer" problem must be a serious concern of all defense contractors, but we believe that our established policy of reporting to and cooperating with the proper authorities will go a long way toward solving the problem. In addition, we believe that the problem can be adequately dealt with by an industry commitment to resolving it. For example, Garrett hopes other companies will consider the proposed Garrett policy set forth

above to disclose certain additional information to prospective employers about employees terminated for unethical conduct. Garrett fully supports standardized forms so long as their use is voluntary, and joint steps which would be appropriate in unifying industry procedures. Garrett will willingly be in the forefront of efforts to protect the industry, but it should not have to stand alone in its possible exposure to employee suits.

In sum, Garrett believes that a reasonable balance can be struck between the need to protect an employee's reputation and the need to protect the government and other contractors from unethical buyers. Garrett tries to lessen the likelihood of hurting the employment prospects of individuals who may not be culpable by presenting them with the results of investigation and giving them a chance to respond. The fact that several individuals who were terminated for conflict of interest in late 1985 signed statements reporting their improprieties after being confronted with evidence against them demonstrates not only Garrett's commitment to carrying out the most rigorous and thorough investigation possible, but also its commitment not to take any action without giving the affected individuals a chance to respond to allegations against them. Disclosure of the reasons for terminating those individuals who admit to the improprieties is appropriate because of the conclusive evidence against them. We feel that the legitimacy of Garrett's procedures will be affirmed by other affected defense contractors

and that through joint industry-wide effort, the culture of the so-called "roving buyer" may, with confidence, be minimized.

Garrett appreciates this opportunity to respond to the Subcommittee's inquiries and to present its views on means of remedying the unethical business practices characterized by the "roving buyer" problem.

EXHIBIT A

The Garrett Corporation
9851 SEPULVEDA BLVD
P.O. BOX 92248
LOS ANGELES
CALIFORNIA 90009
Tel (213) 670-9311/776-1010
Tax 910-346-6729

APPLICANT PLEASE COMPLETE

COMPANY NAME

STREET ADDRESS

CITY ZONE STATE

Gentlemen

The person whose name appears below has applied for employment. Your prompt verification will be appreciated and held in confidence.

NAME (USED IN YOUR EMPLOY

JOB TITLE	RATE PAID	EMPLOYED FROM (DATE)	TO (DATE)
SOCIAL SECURITY NUMBER	REASON FOR LEAVING		

I hereby authorize the company or person named above to give any and all information regarding my employment, as well as other information, whether personal or otherwise, that may or may not be on your records. I release you and your company from all liability for damage whatsoever that may issue from furnishing this information.

Date _____ _____
SIGNATURE OF APPLICANT

FORMER EMPLOYER PLEASE COMPLETE

Employed by you From ____ (month) ____ (year) To ____ (month) ____ (year) From ____ (month) ____ (year) To ____ (month) ____ (year)

Job Title RATE

Rating Please check	Very good	Good	Fair
Ability			
Conduct			
Effort			

Reason for leaving Resigned ☐ Laid Off ☐ Discharged ☐ Other ☐ _____
(DISCHARGED OR OTHER PLEASE EXPLAIN)

Eligible for rehire Yes ☐ Possibly ☐ No ☐ _____
(IF NO OR POSSIBLY, PLEASE EXPLAIN)

Signature _____ Title _____

One of The Signal Companies

EXHIBIT B

EMPLOYEE STATUS NOTICE

EMPLOYEE'S NAME			REQUISITION NO.				PERMANENT NO.		
BIRTH DATE	SOCIAL SECURITY NO.		BENEFITS CODE	DENTAL		I.P.P.	CHANGE CODE	EEOC CODE	
TYPE OF NOTICE			CHECK REQUEST DATE				EFFECTIVE DATE		
START ☐ STATUS CHANGE ☐ 90 DAY REVIEW ☐ TERMINATION ☐									
DEPT.	FROM		TO						
SHIFT									
JOB TITLE							☐ DIRECT		
CODE							☐ INDIRECT		
	BASE	COL.	SHIFT BONUS	ACTUAL	BASE	COL.	SHIFT BONUS	ACTUAL	AMT. OF INC.
RATE									

PERMANENT STATUS ☐ YES ☐ NO

LEAVE OF ABSENCE - REASON

DATES: _____ WITH PAY ☐

_____ WITHOUT PAY ☐

_____ FROM _____ TO _____

REMARKS

APPROVED	DEPT.	DATE	EMPLOYEE	DATE
			MEDICAL STATUS	
			PERSONNEL	
			PERSONNEL	

TO BE COMPLETED FOR TERMINATIONS ONLY

I have delivered to my supervisor or to other authorized persons all items belonging to the GARRETT CORPORATION.

SUPERVISOR'S CHECK LIST

- ☐ BOOKS OR MANUALS
- ☐ CO. EQUIPMENT OR PAPERS
- ☐ EXPENSE-ADVANCES & TICKETS
- ☐ ENGINEERING LIBRARY
- ☐ CREDIT CARDS
- ☐ AIR TRAVEL CARD
- ☐ INSPECTION CRIB
- ☐ KEYS
- ☐ LAB STORES
- ☐ SAFETY EQUIPMENT
- ☐ UNIFORMS
- ☐ TOOL CRIB
- ☐ CLASSIFIED DATA

PERSONNEL CHECK LIST

- ☐ EMPLOYEE STORES
- ☐ PETTY CASH LOAN
- ☐ SAVINGS PLAN
- ☐ SEVERANCE SIGNED
- ☐ I.D. CARD
- ☐ BADGE
- ☐ ARC
- ☐ BANK LOAN

CONFIDENTIAL INFORMATION AND INVENTION AGREEMENT

I read and executed the confidential information and invention agreement at time of hire. I understand its requirements and acknowledge that it remains in effect after termination.

LIFE INSURANCE AND HEALTH CARE PLAN

I acknowledge receipt of notification that I am entitled to convert my Group Life Insurance and Garrett Health Care Plan.

CERTIFICATION

I certify that the above information, representations and statements are correct to the best of my knowledge and belief.

EMPLOYEE (SIGNATURE) _____ **WITNESS** (SIGNATURE) _____

CHANGE CODES

STARTS
- 11. NEW HIRE
- 12. REHIRE
- 13. REINSTATE
- 14. DIV. TRANSFER-IN
- 15. NAME CHANGE
- 16. MILITARY REINSTATEMENT
- 17. TEMPORARY HIRE
- 18. PART TIME HIRE

TRANSFER
- 21. CO. REQUEST
- 22. EMP. REQUEST
- 23. MEDICAL
- 24. RETURN LEAVE

RATE CHANGE
- 31. MERIT
- 32. PROMOTION
- 33. ADJUSTMENT
- 34. DECREASE
- 35. GENERAL INCREASE

CLASS CHANGE
- 40. CLASS CHANGE
- 41. CODE CHANGE
- 42. JOB RESTUDY

LEAVE
- 51. MEDICAL WITHOUT PAY
- 52. MEDICAL WITH PAY
- 53. PERSONAL WITHOUT PAY
- 54. PERSONAL WITH PAY
- 55. MILITARY
- 56. SUSPENSION
- 57. EXTENDED DISABILITY

TERMINATION
- 61. RESIGNATION
- 62. LAYOFF
- 63. DISCHARGE
- 64. MEDICAL
- 65. RETIREMENT
- 66. MILITARY
- 67. PROBATIONARY
- 68. DEATH
- 69. DIV. TRANSFER-OUT
- 70. TEMPORARY TERM

CORRECTION
- 80. CORRECTION

EEOC CODES
- 0. CAUCASIAN
- 1. BLACK
- 2. ASIAN
- 3. AMERICAN INDIAN
- 5. HISPANIC
- H. HANDICAPPED

DISTRIBUTION
- WHITE – PERSONNEL
- YELLOW – PAYROLL
- BLUE – DEPARTMENT
- PINK – INDIVIDUAL
- GREEN – DEPARTMENT

FORM 7235 5-80

STATEMENT OF

JOHN J. RICHARDSON
SENIOR VICE PRESIDENT - HUMAN RESOURCES
NORTHROP CORPORATION

BEFORE

THE UNITED STATES SENATE
COMMITTEE ON GOVERNMENTAL AFFAIRS
SUBCOMMITTEE ON OVERSIGHT
OF GOVERNMENT MANAGEMENT

JUNE 11, 1986

STATEMENT OF JOHN J. RICHARDSON
Senior Vice President - Human Resources
Northrop Corporation

Mr. Chairman and members of the Subcommittee, I am John Richardson, Senior Vice President - Human Resources, of the Northrop Corporation. I am pleased as a representative of Northrop to provide my views on the subject of certain employment practices in the defense sector of our economy. My statement consists of an overview of the problem you are addressing, combined with specific responses to the questions addressed to Northrop prior to the hearing.

We at Northrop are sensitive to the public trust placed in our industry. We are keenly aware of our responsibilities in helping to build a stronger national defense. We want that trust, and accept those responsibilities.

We also understand that the defense process cannot long survive without the trust and confidence of the American people. Unethical conduct of whatever nature, and of whatever magnitude, can undermine that trust, and can weaken that confidence. And whenever and wherever it occurs, the achievement of our national security objectives can only suffer.

For our part, Northrop does not tolerate kickbacks, or bribes -- paid or accepted, solicited or offered, directly or indirectly -- or any other unethical conduct. Where such conduct exists, we want it ferreted out, quickly and completely, and the wrongdoers prosecuted whenever possible. Our past actions have demonstrated our commitment to these principles.

In this regard, Major General Bernard L. Weiss, Commander of the U.S. Air Force Contract Management Division, in a recent speech to the Aerospace Industries Association, offered what I believe is a useful perspective. The essential starting point, he said, is a firm commitment to high ethical standards. General Weiss then stressed the need to follow through on that commitment, a follow-through that might include:

-- strict internal audit procedures and a corporate-level focal point for ethics program implementation,

-- a non-punitive feedback mechanism for reporting suspected fraud and a highly visible ethics training program,

-- a disciplined procurement process and firm gratuities policies, policies which by the way, should specifically define unacceptable conduct and emphasize that dealings with subcontractors, vendors and suppliers are to be on the same basis as dealing with the government;

-- crossfeeding industry ideas on ethics -- problems and solutions -- throughout American industry, whether defense or otherwise, and the development, promulgation and living by a code of ethics that sets the highest of standards.

In all this, there is a simple but fundamental reality. People make the commitment to integrity work, and people cause it to fail. And that's why thoughtful and effective employment practices can truly make an important difference.

A principal problem we face is that situations where improper procurement procedures are detected are not always black and white. As expressed above, when there is clear wrongdoing, the response must be swift and sure. Investigation, termination, and, if appropriate, prosecution is the right sequence of events. Often, however, the situation is better described in shades of gray. It is here that dealing with the problem becomes much more difficult.

Our defense establishment exists to protect our way of life, a democracy founded on the respect for the freedom and rights of the individual. There's no question that all of us respect and are concerned with the rights to due process of all workers, with the legal statutes and regulations governing individual civil rights, and with responsible business conduct that makes for positive employee-employer relations.

At the same time, there is also concern -- and I speak from my vantage point in industry -- for the protection of the interests of the company and the customer -- and of course, in the defense business, the government is our customer.

The dilemma is unmistakable. On the one hand, the mere suspicion that an employee may be or may have been involved in illegal or unethical behavior, is not sufficient legal cause for termination, or for passing information regarding our suspicions to other companies -- just as it is insufficient to merit criminal prosecution or conviction. And the impact on the individual employee can be disastrous if the suspicions are wrong.

Under present law, the company must be prepared to prove that any company action, including termination for cause, is supportable based upon substantial, or clear-cut evidence of wrongdoing. On the other hand, if we are to respond effectively to public expectations and our customer's requirements, we must take all possible steps to address this issue.

As outlined by General Weiss, the most desirable initiative is prevention -- maintaining a positive ethical environment. At Northrop, each employee involved in procurement activities receives instruction in DOD procurement regulations, and is required to sign an annual conflict of interest statement. This is in addition to the ethics training and Code of Ethics statement required of all Northrop employees, and a corporate-wide standards of conduct program now being implemented.

Multiple approval and review levels for purchasing activities are in effect wherever possible, and periodic internal audits are important features of the internal Northrop business environment, one that stresses prevention. We are constantly looking at ways to strengthen that environment, ways to build an ever more positive and sensitive awareness of ethical requirements. For example:

-- We are initiating an improved system to facilitate prompt reporting by vendors and employees of suspected abuses and ethical problems.

-- We are investigating the most effective and efficient way of rotating procurement personnel to make it more difficult for potentially unhealthful relationships to develop.

Let me interject to make the point that it has been Northrop practice, in situations where absolute proof of misbehavior would be difficult to obtain, to deal with the problem constructively. Where there is any question as to the propriety of an individual performing a procurement function, it may be possible to move the employee into a position without purchasing responsibilities. Where there is sufficient evidence of unethical conduct to confront an employee, but not absolute proof, we may make an arrangement that allows an employee to resign. As we see it, this approach does not jeopardize individual rights. At the same time, it removes an individual from the position where abuse was suspected. A perfect solution? Far from it. But it does attack the immediate problem head-on.

-- We are also looking at how best to build greater understanding with our subcontractors and suppliers, and to enlist their support in reporting suspected illegal or unethical behavior.

-- We are working to make our job interviewers more capable in the art of inquiry. As they go about their task of dealing directly with applicants, we believe that skilled inquiry can bring to light critical information before a hiring decision is made. Training these key personnel should bear fruit by teaching methods which probe deeply into applicants' background without violating legal restrictions or individual rights.

We at Northrop feel that the issues of kickbacks, bribes and fraud in subcontracting impact the perception of integrity in our industry. Our senior management is dedicated to insuring that appropriate measures are taken to deal with this serious problem. The focus which has been placed on the problem cannot fail to help bring it under control. The Subcommittee's attention, the efforts of DOD audit and investigatory agencies, and the activities of the prosecuting agencies and of the judiciary will all work to create an environment in which it is clear that integrity and ethical behavior in procurement activities are the unquestioned standard, as in all facets of our business.

In specific response to the questions directed to Northrop prior to the hearing, the following information is provided:

QUESTION: The procedures and policies your company follows when providing job information and references to a prospective employer concerning a current or former employee, in particular when that employee has engaged or is suspected of having been engaged in unethical business practices.

RESPONSE: Northrop has a written policy that commits to company employees that the only data provided in response to routine employment verifications are the dates of employment and job title. This policy was adopted years ago and is the result of: laws and regulations safeguarding an individual's civil rights and to prevent blacklisting; the protection of individual privacy; and the company's long standing concern with insuring that in all the company's administrative practices, due process is given to all employees.

QUESTION: The procedures and policies your company follows when obtaining references from other companies or individuals concerning prospective employees, in particular to screen for past unethical business practices.

RESPONSE: In Northrop's operating divisions, the division employment departments are responsible for:

- verifying previous employment (dates, position, reason for termination, salary);
- conducting checks of personal references;
- requesting Fidelifax to check criminal records;
- verifying college degrees.

In the larger divisions, in-house investigations units assist with reference checking.

Additionally, in certain sensitive procurement positions, security clearances are required. In these cases, the government's clearance procedure provides an additional means to screen for evidence of past unethical behavior.

Unfortunately, even though the company may ask a previous employer the right questions in an effort to obtain information about an applicant, there is no assurance of obtaining candid or complete information.

QUESTION: The extent to which legal restrictions, in statutes or case law, provide the basis for your company's practices and procedures as described in your answers to the previous questions. Please be as specific as possible.

RESPONSE:

REFERENCE CHECKING

One of the primary reasons employers, particularly California employers, are reluctant to provide information concerning employees is the potential liability under statutes and common law. A majority of cases dealing with employment references or the screening of job applicants involve defamation claims. Specifically in California under California Civil Code, sections 45 and 46, a statement can be alleged to be defamatory even if the employee authorizes the prospective employer to check references, and even if the statement is technically accurate.

Some cases in point (not all are from California) follow:

Agarwal v. Johnson, 25 Cal.3d 932: The employer was held liable for general and punitive damages because the prior employee was denied employment two times because of bad references.

Carney v. Memorial Hospital, 485 N.Y. Supp.2d 984: The employee recovered damages, including punitive damages, because the former employer stated that he had been terminated "for cause."

Mckinney v. County of Santa Clara, 110 Cal. App.3d, and Grist v. Upjohn Co., 16 Mich. App.452: The employer was liable even though it failed to say anything about the former employee. The basis for rejection was the employee's own statement outlining the reason the former employer indicated was the basis for his discharge.

Lewis v. Equitable Insurance Company, 361 N.W. 2d 875: A jury awarded damages in excess of $1,000,000 because the employer stated that the employee was suspected or accused of insubordination, but had no absolute proof.

TERMINATION OF EMPLOYEES

Wrongful termination cases can be subject to extensive liability. Jury awards in such cases have been as high as $60 million.

If an employer were to terminate an employee based on a previous employer's report of suspicion of wrongdoing, the current employer, if sued, would have the burden of showing that the current job performance has been affected sufficiently to justify termination.

ADDITIONAL NOTES

Other statutes bearing on the subject include: Federal Public Disclosure Act, 5 U.S.C. Section 552(b)(6); California Public Records Act, California Government Code Sections 6250-6265; California Anti-Blackballing Statute, California Labor Code, Sections 1050-1054; Prohibition of Disclosure of Arrest Not Resulting in Conviction, California Labor Code, Art. 432.7

Legal opinions suggest that the more information an employer provides, the greater the risk of successful litigation; and the less information, and the less subjective the information, the smaller the risk. As a result, most legal advice recommends only the disclosure of dates of employment, the position held, and salary.

QUESTION: How employers should screen job applicants to discover past instances of involvement with kickbacks.

QUESTION A: Whether the prospective employer should contact former employers in writing about the job applicant.

RESPONSE A: Yes. Verification of routine information can be handled most easily this way. It also provides a way to give written authorization from the prospective employee to the previous employer.

QUESTION B: What questions the prospective employer should ask the former employer.

RESPONSE B: The prospective employer should ask for the following information:

- dates of employment,
- position or job classification,
- salary,
- reason for termination including information relative to termination for cause, or forced resignation,
- knowledge of record of criminal convictions.
- quality of performance,
- reliability.

QUESTION C: Whether the prospective employer should routinely require job applicants to release former employers from any civil liability associated with disclosing employment information about him or her.

RESPONSE C: Companies should be in a position to require applicants for certain sensitive positions to authorize, in writing, that former employers release factual information pertaining to that individual's prior employment. However, there is some question as to the legal effectiveness of such a release in protecting the former employer. In any case an individual

should not be expected to waive his rights to sue in the event of a breach of his civil, common law or statutory rights -- such as where the prior employer provides inaccurate or defamatory information.

QUESTION D: If information from a former employer leads the prospective employer to reject the job applicant, whether the prospective employer should first give the job applicant an opportunity to respond.

RESPONSE D: We do not believe the opportunity to respond is necessary. Rejection based on legally obtained, factual information, — not suspicion, allegation, or innuendo — can be expected to stand on its merits without a requirement for rebuttal from the applicant. To do otherwise would place the prospective employer in the role of mediator or arbitrator.

QUESTION: The procedures and policies your company follows in the event it strongly suspects an employee of taking subcontractor kickbacks; in particular, whether it will terminate the employee or allow the employee to resign and what explanation it will provide on the employee's official separation documents.

RESPONSE: Whenever there is an indication or information that an individual may be engaged in unethical behavior, of whatever nature, the company immediately undertakes an investigation. Depending on the nature of the case, the investigation is accomplished in various ways, may involve different company personnel or functional organizations, and can also involve outside agencies including the FBI and other governmental agencies.

In cases where misbehavior is determined, the sternest appropriate disciplinary action is taken based on the seriousness of the infraction — up to and including discharge and the pursuit of criminal prosecution.

In situations where sufficient proof of misbehavior cannot be obtained, but where there is sufficient evidence to confront an employee, that employee may be allowed to resign. This procedure removes an individual from the position where abuse was suspected. As such, it attacks the immediate problem head-on, but does not create potential liability on the part of the company to the same extent a termination would. The separation documents would reflect accurately the nature of the separation -- termination for cause, resignation for personal reasons, or for other reasons as the facts may support.

QUESTION: Whether federal legislation is necessary to set industry standards for handling suspect employees and screening job applicants, or whether industry alone can and should address the problem.

RESPONSE: We are unable to recommend new legislation in this area. There appear to be sufficient laws and regulations governing unethical and unlawful behavior of employees. There are no misunderstandings regarding the expectations of the Federal Government concerning individual rights in this context.

In many respects, the issue reflects the classic conflict between individual rights and enforcement. Viewed in these terms, it would be inappropriate for Northrop to recommend legislative change. Only Congress can and should make such judgements. It is clear, however, that if materially more aggressive action is expected from industry, some greater insulation must be granted to companies. Currently, the liabilities imposed by the framework of existing law preclude any significant change in our approach.

QUESTION: Whether the problems associated with employing persons suspected of or known to engage in unethical business practices are serious enough to warrant industry-wide action, and, if so, what action industry should take.

QUESTION A: Whether industry should develop standard forms for job applications, employment references, or separation documents.

RESPONSE A: It is highly unlikely that a system could be established -- either from a practicality standpoint or a legal one -- that would get the entire defense sector of the American economy to act in concert in establishing standardized procedures for addressing this issue.

The same difficulties would hold true with regard to standardized forms. However, companies should be encouraged to review employment applications and forms to insure they contain appropriate and legally proper questions regarding reasons for termination or separation and include a reference to information concerning criminal convictions.

QUESTION B: Whether industry should develop guidelines for screening job applicants for instances of past misconduct and handling employees suspected of unethical business practices.

RESPONSE B: Yes, Industry can and should develop appropriate, feasible guidelines within the limitations described in the preceding answer. Suggestions offered by Major General Bernard L. Weiss in a recent speech to the Aerospace Industries Association might provide an effective starting point. General Weiss' suggestions include:

- o strengthening internal audit procedures,
- o establishing a full time ethics director,
- o implementing a fraud "hotline,"
- o establishing an ethics training program,
- o rotating buyers periodically,
- o establishing firm gratuities policies.

In addition, it would be helpful if companies would agree to provide available factual information, in response to legitimate reference inquiries relative to current or former employees who have been proven to be involved in illegal or unethical behavior leading to their termination, discharge or reassignment out of a position of trust.

There are, in fact, initiatives underway which go some distance toward establishing industry standards for ethics and conduct. For example, the Aerospace Industries Association (AIA) is currently considering an amendment to its by-laws which requires all member companies, as a condition of membership, to have in place a code of conduct. Further, the code itself must satisfy certain requirements to industry: a means of enforcement, an internal audit mechanism, and a requirement for annual recertification to AIA. This will serve as another means to insure management and employees focus on this important issue.

I would like to close by expressing my appreciation to the Members of this Subcommittee for providing the opportunity to share my thoughts on this important and complex issue. By and large, we are impressed with and proud of the quality of our people who perform Northrop's many and varied procurement responsibilities. But unethical and improper behavior, even though not representative of the general population at Northrop, or throughout the industry, must be reduced to the irreducible minimum. The focus and attention that you are providing cannot help but contribute to the process of identifying solutions to accomplish this. Thank you.

SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS

SUBCOMMITTEE ON OVERSIGHT

OF GOVERNMENT MANAGEMENT

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HEARINGS ON

SUBCONTRACTOR KICKBACKS

JUNE 11, 1986

WRITTEN STATEMENT

OF

BERWYN N. FRAGNER

VICE PRESIDENT, HUMAN RELATIONS

TRW ELECTRONICS & DEFENSE SECTOR

REDONDO BEACH, CALIFORNIA

Mr. Chairman and Members of the Subcommittee, I am pleased to be here today to testify on behalf of TRW in response to the Subcommittee's request. I am Berwyn N. Fragner, Vice President of Human Relations at the Electronics & Defense Sector of TRW in Redondo Beach, California. Our written statement provides answers to the Subcommittee's specific questions regarding subcontractor kickbacks set forth in your letter of May 23. We believe this is an important and useful hearing addressing the serious issue of illegal subcontractor payments.

1. THE PROCEDURES AND POLICIES YOUR COMPANY FOLLOWS WHEN PROVIDING JOB INFORMATION AND REFERENCES TO A PROSPECTIVE EMPLOYER CONCERNING A CURRENT OR FORMER EMPLOYEE, IN PARTICULAR WHEN THAT EMPLOYEE HAS ENGAGED OR IS SUSPECTED OF HAVING ENGAGED IN UNETHICAL BUSINESS PRACTICES.

To persons or companies inquiring about a former or current employee (i.e., employment verification), our practice is to provide the employee's period of employment and most recent position title. Salary confirmation is provided only if requested in writing and then only if the employee has signed a release.

When TRW is contacted for a reference check on current or former employees, the contact is usually made to a supervisor, whose name is provided by the employee. (TRW is a large, geographically dispersed organization. At certain locations procedures and practices may differ from those described here. Policies and procedures generally are very consistent for hiring new employees.)

Information provided by TRW in response to reference checks by other companies is at the discretion of the supervisor or person contacted. Company policy does not prescribe or proscribe what information is provided.
When hiring supervisors seek counsel from our Human Relations or Law Department staffs, they are cautioned on the detail of information they should provide on a reference check.

2. THE PROCEDURES AND POLICIES YOUR COMPANY FOLLOWS WHEN OBTAINING REFERENCES FROM OTHER COMPANIES OR INDIVIDUALS CONCERNING PROSPECTIVE EMPLOYEES, IN PARTICULAR TO SCREEN FOR PAST UNETHICAL BUSINESS PRACTICES.

In obtaining references from other companies or individuals on a prospective employee, TRW practice requires the hiring supervisor to conduct reference checks prior to extending an offer. Generally this is done by telephone.

First, the TRW employment application (Attachment A - Systems 760 Rev. 10-85) requires the applicant to sign a waiver. This authorizes TRW to obtain

information from former employers and seeks to release previous employers and others from liability in connection with the inquiries.

Second, in obtaining reference information, the supervisor uses a company reference check form (Attachment B - Systems 1138 Rev. 1-77) which includes twenty-two separate questions about the applicant.

The reference check questions specifically ask: (1) if the employee's current company would have any reservations in recommending the employee for hire; (2) why the employee is leaving his or her position; and (3) if the employee's supervisor would hire or rehire the employee. Finally, the TRW supervisor using the form must comment on the validity of the reference check itself.

Our supervisor is encouraged to contact other former supervisors for reference checking, using names provided by the applicant. In addition, the hiring supervisor may make contact with his or her own personal or professional colleagues regarding the applicant.

In 1982, the division of TRW responsible for the hiring of buyers at our major facility in Redondo Beach, California adopted supplemental procedures for pre-employment screening. In this procedure (see Attachment C - Interoffice Communication to Supervision and Pre-employment Personnel Screening Form), the TRW Security Department conducts a brief background check on the applicant prior to the extension of the offer.

This check is made to confirm some of the basic information available from public records (e.g., educational achievements). If relevant negative information is discovered as a result of this background check, the applicant is usually rejected. For individuals we deem to be in sensitive positions, this has proven to be a satisfactory procedure.

3. THE EXTENT TO WHICH LEGAL RESTRICTIONS, IN STATUTES OR CASE LAW, PROVIDE THE BASIS FOR YOUR COMPANY'S PRACTICES AND PROCEDURES AS DESCRIBED IN YOUR ANSWERS TO THE PREVIOUS QUESTIONS. PLEASE BE AS SPECIFIC AS POSSIBLE.

The federal Privacy Act of 1974, as well as state regulations in California, Colorado and other states, provide the general basis for our company practice. California and many other states in which our company operates have various privacy statutes which do restrict to a certain extent the dissemination of employee information. Nevertheless, the major obstacle to disclosure of negative employee information is not these statutes, but the concern about liability for torts including slander and libel.

Since these torts are based on allegations of harm resulting from false information, providing information either orally or in written form must be done with complete accuracy to avoid potential liability.

Much of the relevant information useful in making an employment decision is subjective -- it is based on various opinions of an employee's performance. Opinion is not easily provable as fact and can be used as grounds for a

defamation suit. This is especially true in cases of individuals who are suspected of illegal conduct but have not been convicted of crimes.

The high cost of litigation is a serious concern for all companies. Defending a defamation suit brought by an employee for information given to a prospective employer can cost TRW between $140,000 to $250,000 per case. The risk of disproportionate legal costs for defense of employee libel suits is an inhibiting factor to a candid exchange of even factual information between companies.

At best the company that has done nothing improper may have to spend thousands of dollars defending its actions with no way of recovering these costs. It is not prudent to risk a large financial loss to provide other than basic information on former employees.

4. HOW EMPLOYERS SHOULD SCREEN JOB APPLICANTS TO DISCOVER PAST INSTANCES OF INVOLVEMENT WITH KICKBACKS.

a. WHETHER THE PROSPECTIVE EMPLOYER SHOULD CONTACT FORMER EMPLOYERS IN WRITING ABOUT THE JOB APPLICANT.

TRW does not believe that requesting information in writing will yield better reference data. In fact, we believe that the prospect of providing such information in writing and signing one's name will generate more caution than

now exists notwithstanding the applicant's signed release to hold the respondent free from any liability.

b. WHAT QUESTIONS THE PROSPECTIVE EMPLOYER SHOULD ASK THE FORMER EMPLOYER.

Encouraging the use of a formal reference check questionnaire, including questions on legal and ethical conduct, might help assure that hiring supervisors ask such questions. TRW uses such a questionnaire, and it is included as Attachment B. Although this questionnaire does not include a specific question on legal and ethical conduct, it does include several questions relating to this subject, including questions 5, 6, 16, 18, 19, and 20. However, the responses to these queries are the critical elements of a productive reference check -- no matter how well structured the questions may be.

c. WHETHER THE PROSPECTIVE EMPLOYER SHOULD ROUTINELY REQUIRE JOB APPLICANTS TO RELEASE FORMER EMPLOYERS FROM ANY CIVIL LIABILITY ASSOCIATED WITH DISCLOSING EMPLOYMENT INFORMATION ABOUT HIM OR HER.

TRW routinely requires a signed release (See Application Form, Attachment A). However, we are not confident that this procedure will prevent a determination of legal liability. It would be helpful if case law and the tort system clarified the legal efficacy of signed employment application waivers.

With such clarification, we could specifically notify the persons we contact for reference checks that the prospective employee has released them from liability. If this release were supported by the courts, it would serve to open more candid communication channels within industry and business.

d. IF INFORMATION FROM A FORMER EMPLOYER LEADS THE PROSPECTIVE EMPLOYER TO REJECT THE JOB APPLICANT, WHETHER THE PROSPECTIVE EMPLOYER SHOULD FIRST GIVE THE JOB APPLICANT AN OPPORTUNITY TO RESPOND.

Historically, TRW hiring supervisors and the Human Relations staff have been extremely wary of confronting an applicant with negative information obtained through reference checks. This caution has been a source of frustration, given our desire to be fair and open with our employees. As a result, the usual procedure is to reject the applicant.

5. THE PROCEDURES AND POLICIES YOUR COMPANY FOLLOWS IN THE EVENT IT STRONGLY SUSPECTS AN EMPLOYEE OF TAKING SUBCONTRACTOR KICKBACKS; IN PARTICULAR, WHETHER IT WILL TERMINATE THE EMPLOYEE OR ALLOW THE EMPLOYEE TO RESIGN AND WHAT EXPLANATION IT WILL PROVIDE ON THE EMPLOYEE'S OFFICIAL SEPARATION DOCUMENTS.

If TRW has any indication that an employee is taking kickbacks or is otherwise involved in unethical behavior, TRW initiates an immediate investigation. The investigation is conducted under the purview of the Law Department with the the local District Attorney are notified when appropriate.

During the course of an investigation that is uncovering negative information, the company may suspend the employee without pay, with pay, or may transfer the employee to another position unrelated to the problem.

If the company is satisfied that there has been serious wrongdoing, the employee will be involuntarily terminated and termination documents will be marked "ineligible for rehire" with the reason for termination noted. The employee is not permitted to voluntarily resign once the company suspects or knows of serious wrongdoing.

6. WHETHER FEDERAL LEGISLATION IS NECESSARY TO SET INDUSTRY STANDARDS FOR HANDLING SUSPECT EMPLOYEES AND SCREENING JOB APPLICANTS, OR WHETHER INDUSTRY ALONE CAN AND SHOULD ADDRESS THE PROBLEM.

TRW does not believe that Federal legislation setting industry standards is necessary. We emphasize that the problem relates to the risk and cost of litigation, whether or not the company is found to be wrong. This must be addressed not by statutes, but by solving the present condition of tort liability in our legal system.

In addition to, and perhaps because of, the tort liability situation, we must recognize that we are dealing with some very broad societal issues. Americans move freely from job to job. Americans place a premimum on not blackballing people, and American business is sensitive to issues which could smack of discrimination. American business struggles with what is the correct thing to

do to ensure that they are able to hire people who are not only competent, but also have the more subjective qualities of honesty and high ethical standards. All of us must address these issues as we look at industries or job categories which may have more vulnerability than others. But, we also must recognize that we have a broad societal problem, not an industry or job category problem.

7. WHETHER THE PROBLEMS ASSOCIATED WITH EMPLOYING PERSONS SUSPECTED OF OR KNOWN TO ENGAGE UNETHICAL BUSINESS PRACTICES ARE SERIOUS ENOUGH TO WARRANT INDUSTRY-WIDE ACTION, AND, IF SO, WHAT ACTION INDUSTRY SHOULD TAKE.

a. WHETHER INDUSTRY SHOULD DEVELOP STANDARD FORMS FOR JOB APPLICATIONS, EMPLOYMENT REFERENCES, OR SEPARATION DOCUMENTS.

Standard application forms, reference checking forms and separation documents not only do not have any particular value but may be extremely burdensome and prevent companies from having the flexibility to operate in a competitive environment.

b. WHETHER INDUSTRY SHOULD DEVELOP GUIDELINES FOR SCREENING JOB APPLICANTS FOR INSTANCES OF PAS MISCONDUCT AND HANDLING EMPLOYEES SUSPECTED OF UNETHICAL BUSINESS PRACTICES.

Industry-wide guidelines for screening applicants could be beneficial if voluntary and developed from shared information on specific practices. However, we question the cost benefits derived from such activity.

It is worth noting that TRW has always been very explicit in requiring the highest standards of legal and ethical conduct from its employees. We take specific action to communicate to the employee population these standards and our long-standing policy prohibiting conflict of interests. (See Attachments D "Legal and Ethical Conduct" & E "Conflicts of Interest")

In addition, the published Chief Executive Office statement "TRW and the 80s" affirms that "adherence to the highest standards of conduct" is the fundamental objective which guides the corporation's decisions and actions. (See Attachment F "TRW and the 80s")

Copies of these policy statements are sent periodically to all employees, posted on conspicuous company bulletin boards, and form the basis for focused training. Employees are requested, on a periodic basis, to update a "Conflict of Interest Certification Form" (See Attachment G) which is placed in the employee's official personnel file. (In addition, employees with purchasing responsibilities in Material Operations are required to complete forms on an annual basis, attesting to their awareness of the specific provisions of company policies.)

Further, a wide variety of media are used to communicate company policies on legal and ethical conduct. These include seminars conducted by the Law Department and general distribution videotapes. These seminars stress the absolute necessity of ethical conduct, cite industry cases, and stress the disciplinary procedures that will be taken by the company.

Communication regarding legal and ethical conduct is an integral part of our new-hire orientation sessions. Moreover, each new hire is required to complete a "Conflict of Interest Certification Form" on the first day of work.

We appreciate the opportunity to respond to the Subcommittee's questions on the subject of illegal subcontractor payments. The concerns are legitimate but the solutions complex.

UNITED STATES SENATE

Committee on Governmental Affairs

Subcommittee on Oversight of Government Management

Statement

Theodore J. St. Antoine
James E. & Sarah A. Degan Professor of Law
University of Michigan

June 11, 1986

My name is Theodore J. St. Antoine. I am a Professor of Law at the University of Michigan, where I have been teaching labor and employment law for over twenty years. From 1981 to 1984 I was the first public co-chair of the newly formed Committee on Individual Rights and Responsibilities in the Work Place, established by the American Bar Association's Labor and Employment Law Section. Today I am speaking only for myself, however, and not on behalf of any organization. I am most appreciative of this opportunity to present my views to you.

Earlier this year this Subcommittee received testimony that subcontractor kickbacks are a nationwide problem for the defense industry. The Subcommittee now intends to focus on allegations that persons who resign or who are discharged from one prime defense contractor under suspicion of taking kickbacks are able to find new employment with other defense contractors. The suggestion is that federal authorities would benefit from stronger criminal and civil laws to combat the problem. You have asked me to comment on the legal issues involved in job application and termination procedures.

I should first make clear that I have made no independent investigation of alleged subcontractor kickbacks in the defense industry. Therefore I shall not deal with the possible need for corrective federal legislation. I shall confine my remarks to the legal implications of various steps that might be taken.

One starts with the proposition that in the absence of some specific statutory protection (such as antidiscrimination legislation) or some specific contractual provision (such as a collective bargaining agreement's guarantee against "unjust discharge"), an American employee has traditionally been subject to the doctrine of at-will employment. That means he or she can be fired at any time for any reason whatsoever. Similarly, a job applicant can be rejected for any reason whatsoever, except for such forbidden grounds as race, sex, religion, and so on. Furthermore, in recent years about thirty states have qualified the at-will doctrine in one respect or another. Some state courts have declared that an employer cannot dismiss an employee in violation of a fundamental public policy -- for example, because the employee refuses to commit perjury to protect his employer, or because the employee refuses to join in an employer's illegal price-fixing scheme. Other state courts have provided employees with contractual protections against unjust discharge by reading literally what formerly would have been treated as merely a nonbinding statement of current company policy -- for

example, a passage in a personnel manual that employment will be terminated only for "just cause."

More to the point for our immediate purposes, the increasing attention paid employee job rights has led to a heightened scrutiny of the whole process by which persons apply for jobs, are evaluated, and are accepted or rejected. Typically, two employers are involved -- the prospective employer, who is seeking information about the applicant on which to base the hiring decision, and a former or current employer, who may possess pertinent information concerning the candidate.

1. The former or current employer. In 1983 the ABA Committee on Individual Rights and Responsibilities in the Work Place had this to say about the legal constraints on a company providing unfavorable information about an employee (ABA Sec. Lab. & Emp. Law, 1983 Comm. Rep., p. 43):

> Defamation is the publication of false and derogatory statements about an individual. RESTATEMENT (SECOND) OF TORTS, § 588 (1977). Because employer representatives commonly make derogatory comments in the course of terminating an employee and in explaining to the employee and others the reasons for the termination, defamation is one of the most common tort theories invoked by terminated plaintiffs.
>
> Most jurisdictions grant employers a qualified privilege to disseminate derogatory information about employees to "interested" persons, usually defined as persons who have a "need to know" the information because of their job duties. See, e.g., Arsenault v. Allegheny Airlines, Inc., 485 F. Supp. 1373 (D. Mass.), aff'd, 636 F.2d 1199 (1st Cir. 1980), cert. denied, 454 U.S. 821, 102 S. Ct. 105, 70 L. Ed. 2d 93 (1981). This limited privilege may be lost if the communications are shown to be motivated by malice or ill will. See, e.g., Glynn v. City of Kissimmee, 383 So. 2d 774 (Fla. App. 1980). In general, courts appear more willing to apply this privilege to expressions of opinion than to representations of fact. Gordon v. Adcock, 441 F.2d 261 (9th Cir.), cert. denied, 404 U.S. 833, 92 S. Ct. 83, 30 L. Ed. 2d 64 (1971).

In addition to defamation, other possible causes of action would be (1) intentional infliction of emotional distress and (2) interference with contractual relations or prospective economic advantage. The common theme, as I view it, is that the employer must act out of malice or without justification, usually in some extreme or "outrageous" fashion. As noted by the ABA Committee in its analysis of defamation, a "qualified privilege" to disseminate derogatory information to "interested" persons is generally recognized. "Interested" persons include prospective employers. Truthful responses to pertinent inquiries, including the recital of circumstances giving rise to reasonable suspicions, should not be a basis for liability. Of course, the more subjective one becomes -- an expression of one supervisor's personal "belief" -- the more risk there is that a court or jury might find the requisite malice to support a defamation action.

2. Releases. There are few legal documents about which it is harder to generalize than "releases," that is, waivers or disavowals of existing or potential claims against another person. The courts are aware that many releases are executed thoughtlessly or under the compulsion of the moment -- for example, by a partially drugged patient about to undergo emergency surgery. Releases in such circumstances are rarely sustained. On the other hand, releases that do little more than confirm the absence of a liability that the law would probably not impose anyway are almost invariably upheld. Thus, an employer can generally eliminate a discharged employee's cause of action in contract by an express disclaimer in the job application form of any right to continuing employment. Novosel v. Sears, Roebuck & Co., 495 F. Supp. 344 (E.D. Mich. 1980); Crain v. Burroughs Corp., 560 F. Supp. 849 (C. D. Cal. 1983).

Since wide latitude would be allowed employers anyway in the pertinent information they could exchange about job applicants, I am satisfied that the courts would be quite liberal in sustaining releases signed by a person applying for a position. My principal reservation is that the employee's authorization for disclosure should apply to information that may be pertinent to the hiring decision, and should not extend to purely personal matters. At least if authorization and releases become part of a governmentally mandated or monitored program, constitutional protections like the right to privacy may enter the picture, which would not be present if private parties were acting entirely on their own. For this reason, should government become implicated, I would be uneasy about the broad language requesting all information, "whether personal or otherwise," in the two releases the Subcommittee has furnished me as Exhibits "A" and "B." It would probably also be well to have releases printed in larger or bolder type, in order to avoid any claim that they were not noticed.

3. Appropriate questions and "privileged" responses. Two different issues must be distinguished: (1) What questions may a prospective employer ask an applicant, and what use may he make of the answers?; and (2) What information may a past or current employer of a particular person provide a prospective employer in response to inquiries about that person? An employer's questions addressed to a candidate may be challenged either as invasions of privacy or as violations of antidiscrimination laws. The courts have invariably rejected claims against private employers based on privacy grounds. R. Smith, Workrights 52 (1983). As indicated above, however, the reaction might well be different if government were involved, so that the Constitution came into play. Antidiscrimination laws are more significant, and often subtle. Since blacks are more likely to be arrested than whites, and since an arrest as such proves nothing legally, arrest records by themselves cannot be the basis of a hiring decision. The same is true of prior wage attachments. A number of states forbid even questions about arrests (as distinguished from convictions). Although one may ask about convictions, one should be careful to demonstrate the relevance of a given conviction to a particular job opening, since blacks are also more likely than whites to be convicted of crime. Aside from this possible applicability of antidiscrimination laws, however, there are almost no limits on what a prospective employer may ask a job applicant.

Certain restrictions or conditions exist on the methods by which a prospective employer may pursue his investigation of an applicant. About half the states prohibit or limit the use of the polygraph, or lie detector. Furthermore, when a

company procures an investigative report on an applicant from an outside firm, the Federal Fair Credit Reporting Act requires it to notify the applicant, who is entitled to be informed by the investigating firm of the "nature and substance" of the investigation conducted.

In exchanges between employers, the problem is not so much what the prospective employer asks as what the former or current employer responds. Mere arrests or wage attachments are troublesome, since the Equal Employment Opportunity Commission regards them as forbidden territory. Beyond that narrow area, however, I believe that the disclosure of any facts (not mere subjective suspicions) that are reasonably pertinent to an employment decision is entirely appropriate and privileged. For these purposes, I consider "facts" to include a grand jury indictment, the results of a careful company investigation, the particular observed incidents supporting an allegation of kickbacks or other wrongdoing, and the particular observed incidents supporting a request that an employee resign. The existence of a grand jury subpoena or investigation is more difficult to classify, if one does not have first-hand knowledge of the reasons behind it. The subpoenaed individual, for example, may have been called simply as a witness, and may be entirely blameless personally. Under my own approach, however, an entirely neutral statement of this fact should be privileged, as long as it is presented without malice and as long as it could reasonably bear on the prospective employer's ultimate determination.

In short, my opinion is that many employers today are much too timid and reticent when faced with legitimate inquiries about former or current employees. The established case law simply does not justify the position that they should confine their responses to the practical equivalent of "name, rank, and serial number." The courts are practical bodies and appreciate the need for fair and honest evaluations of prospective employees, especially those entering sensitive, decision-making or policy-making positions. Too many employers, I believe, may simply be taking the easy way out in failing to pass on information that any responsible person would regard as relevant to any future selection process. To the extent that practice exists, I consider it an outright shirking of an employer's obligation, civic if not legal, to the business community and the larger society.

4. Reasons for an employee's departure. In keeping with the views I have just expressed, I would conclude that a prior employer could not reasonably be sued for defamation (either slander or libel) or for invasion of privacy because it accurately disclosed to a prospective employer (1) the reason for an employee's departure, and (2) the employee's eligibility for rehire.

5. Possible federal legislation. As indicated at the outset, I have no direct knowledge of the evils of kickbacks in the defense industry. I am also not close enough to the Department of Defense to have much sense of the administrative costs -- in both time and money -- that would have to be shouldered if the Department undertook the massive task of monitoring the employee selection process, or some substantial part of it, throughout the defense industry. In the absence of a firmer grasp on the cost-benefit aspects of this problem, I am reluctant to recommend any specific legislation to deal with it. I shall offer instead a few general suggestions.

First, I am dubious about using the criminal law to enforce compliance with any mandate that the Congress might eventually impose on the employee selection process in the defense industry. While criminal activity is ultimately the target, the immediate concern is a mundane personnel procedure, which I don't think should be burdened with the threat of criminal sanctions. Second, I am a strong believer in the insertion of conditions into government contracts as a means of promoting predetermined policy objectives. Regardless of whether one agrees with the specific criteria and methods employed by the Labor Department's affirmative action program under Executive Order 11,246, few would deny the efficacy of its use of hiring goals in federal procurement. I mention this particular program only because I know it well. But resort to conditions in government contracts is an old, well-tested device, and I urge its consideration here. I would further suggest that any legislation adopted might be of the directive or authorizing variety, not attempting to spell out all the details of any set of contract conditions regarding employee selection procedures, but delegating that function to the Department of Defense. Departmental regulations would permit greater flexibility, and perhaps more accommodation to the needs and practices of individual industries. Finally, I do not think that any federal legislation should try to codify or, worse, rewrite the common law of employer privilege. Conditions prescribed for government contracts pursuant to federal statutory authorization in the exercise of the spending power would fully accomplish the objective sought here, and more than that seems to me an unnecessary intrusion into a traditional realm of state power.

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United States Senate
COMMITTEE ON
GOVERNMENTAL AFFAIRS
SUBCOMMITTEE ON
OVERSIGHT OF GOVERNMENT MANAGEMENT
WASHINGTON, DC 20510

July 7, 1986

Professor Theodore J. St. Antoine
Degan Professor of Law
University of Michigan Law School
Ann Arbor, Michigan 48109-1215

Dear Professor St. Antoine:

Thank you for appearing before the Senate Subcommittee on Oversight of Government Management on June 11, 1986, to discuss subcontractor kickbacks in the defense industry and related industry personnel practices.

As indicated during the hearing, the Subcommittee would like your expert opinion on a series of questions concerning the legal liability of employers for providing accurate information to prospective employers about former or current employees.

QUESTIONS

1. Without incurring an unreasonable risk of civil liability for defamation, could a former or current employer reveal to a prospective employer that an employee:

(a) was fired?
(b) was fired for taking kickbacks?
(c) was asked to resign?
(d) was asked to resign because the employer suspected the employee of taking kickbacks?
(e) resigned after being confronted with allegations of unethical business practices?
(f) was suspected by the company of taking kickbacks, but was terminated or voluntarily resigned for other reasons?

(g) is alleged by third parties to have engaged in kickbacks?
(h) is alleged in a newspaper story to have engaged in kickbacks?
(i) is not eligible for rehire?
(j) is not eligible for rehire due to suspected unethical business practices?
(k) is on suspension?
(l) is on suspension pending an investigation into possible unethical business practices?
(m) was suspended during an investigation into possible unethical business practices and never reinstated?
(n) is the subject of an ongoing company investigation?
(o) is the subject of an ongoing FBI investigation?
(p) is the subject of a grand jury subpoena served on the company?
(q) is the subject of an ongoing investigation into possible kickback activities?
(r) was the subject of a completed company investigation which turned up substantial evidence that the employee was taking kickbacks?
(s) was the subject of a completed company investigation which turned up some evidence that the employee was taking kickbacks?
(t) was the subject of an incomplete company investigation into kickbacks, halted after the employee resigned from the company?
(u) was the subject of an investigation by a previous employer into possible kickback activity?
(v) was suspected by a previous employer of unethical business practices?
(w) was fired by a previous employer for unethical business practices?

2. The State of California imposes a criminal sanction on employers who, by misrepresentation, prevent or attempt to prevent a former employee from obtaining new employment. See California Labor Code Section 1050. Assuming its disclosures are accurate, could an employer provide all or any of the information indicated above to a prospective employer without incurring an unreasonable risk of criminal liability under Section 1050?

Your responses to these questions will become part of the official hearing record and will assist the Subcommittee

in evaluating proper personnel practices in the defense industry. If you have any questions, please contact Elise J. Bean of the Subcommittee staff at (202) 224-3682. Thank you for your assistance in this important matter.

Sincerely,

William S. Cohen
Chairman

Carl Levin
Ranking Minority Member

WSC:CL:ejb

THE UNIVERSITY OF MICHIGAN
LAW SCHOOL
HUTCHINS HALL
ANN ARBOR, MICHIGAN 48109-1215

August 1, 1986

Honorable William S. Cohen
Chairman, Subcommittee on Oversight
of Government Management
Committee on Governmental Affairs
United States Senate
Washington, D. C. 20510

AUG 4 1986

Honorable Carl Levin
Ranking Minority Member
Subcommittee on Oversight of
Government Management
Committee on Governmental Affairs
United States Senate
Washington, D. C. 20510

Dear Senators Cohen and Levin:

I have carefully examined each of the twenty-three situations described in your joint letter of July 7, 1986. You raised the question of whether a former or current employer would incur an unreasonable risk of civil liability for defamation in revealing certain facts to a prospective employer about an employee. As you know, there are many subtle gradations in these various situations, and I can imagine that there might be differing practical implications as a result.

As I indicated in my testimony before your Subcommittee on June 11, 1986, however, I do not believe the legal principles of defamation in the various states would produce different results in the twenty-three hypothetical cases you posited. The generally accepted view is that if the prospective employer has a legitimate need to know about a job applicant, then any and all information or opinion provided him in good faith by a current or former employer enjoys a "qualified privilege" under the defamation laws. That means that statements made in good faith and without malice do not incur legal liability, even if they turn out in fact to be inaccurate and injurious.

Judges and juries, of course, are still human, and they have to make those important determinations concerning "need to know" and "good faith." Hence, as a practical matter, I think an employer would have to use some good judgment in passing along, in your example 1(g), the allegations of "third parties" that the job applicant "engaged in kickbacks," or in your example 1(v), the "suspicions" of a previous employer that the employee had engaged in "unethical business practices." Depending on how responsible the third parties were, or how vague and ill-supported were the suspicions of the previous employer, a judge or jury might conclude that the communication was in fact motivated by malice, and thus was not privileged. But that does not affect the legal proposition that an employer speaking in good faith is protected.

Section 1050 of the California Labor Code, dealing with misrepresentations by an employer to prevent a former employee from obtaining new employment, is based on legislation that goes back to 1913. There have been few reported judicial interpretations. Nonetheless, I should think that almost by definition an employer's "accurate" disclosures of the sort of information mentioned in your twenty-three examples would not incur a significant risk of criminal liability.

The problem under section 1050 becomes harder if the disclosures are inaccurate but still made in good faith. The "qualified privilege" rule of defamation (a tort) may not apply to this criminal statute. The statute speaks merely of a "misrepresentation" and not of a "knowing" or "intentional" misrepresentation. Thus an innocent misrepresentation might possibly be covered, especially since the crime defined here is only a misdemeanor. Ordinarily, of course, a crime requires a wrongful intent. But I have carried the discussion beyond the exact question you posed. I am confident that "accurate" disclosures would not be affected by section 1050.

I hope these comments will be of assistance.

Sincerely,

Theodore J. St. Antoine

Theodore J. St. Antoine
Professor of Law

TJS:ngd

"MR. BROWN"

(Currently in prison serving 3-year sentence)

Chronology

TRW, Inc. (Colorado)
8/26/85 Pleaded guilty to accepting kickbacks
8/13/85 Fired
4/29/85 Suspended
4/24/85 Indicted by federal grand jury
11/26/84 Hired

Northrop Corp. (California)
10/5/84 Resigned for "personal reasons"
9/26/84 Suspended due to grand jury investigation
7/26/82 Hired

Hughes Aircraft Co. (California)
7/82 Left
2/81 Hired

McDonnell Douglas Corp. (California)
1/81 Left
1/64 Hired

DOCUMENT PACKET: MR. BROWN

NORTHROP DOCUMENTS

Exhibit B1 — Personnel Change Request; document in Mr. Brown's personnel file at Northrop

Exhibit B2 — Letter from Mr. Brown resigning from Northrop; document in Mr. Brown's personnel file at Northrop

Exhibit B3 — Termination Clearance; document in Mr. Brown's security file at Northrop

Exhibit B4 — Memorandum on preliminary findings of an investigation of Mr. Brown; document in Mr. Brown's security file at Northrop

TRW DOCUMENTS

Exhibit B5 — Letter from Mr. Brown applying for job at TRW; document in Mr. Brown's personnel file at TRW

Exhibit B6 — Telephone Reference Check; document in Mr. Brown's personnel file at TRW

Exhibit B7 — Form sent by TRW to Northrop requesting information about Mr. Brown; document in Mr. Brown's personnel file at TRW

Exhibit B8 — Computer printout sent by Northrop to TRW in response to TRW's request for information about Mr. Brown; document in Mr. Brown's personnel file at TRW

Exhibit B9 — Letter from TRW to Mr. Brown placing him on suspension; document in Mr. Brown's personnel file at TRW

Exhibit B10 — Letter from TRW to Mr. Brown terminating his employment; document in Mr. Brown's personnel file at TRW

Exhibit B11 — Personnel Status Change; document in Mr. Brown's personnel file at TRW

NORTHROP

PERSONNEL CHANGE REQUEST (PCR)

SEE REVERSE FOR INSTRUCTIONS

EXHIBIT 81

Oct. 4, 1984

B-2

From; (Mr. Brown)

To; N.J. Slotrem
V. Ritenour

Dear Mr. Slotrem,

Due to recent circumstances which have transpired, and which were not entirely under my control I feel that it would be in the best interests of both myself and the Northrop Corporation to terminate my position with the company. I feel that I have been unjustly placed in a status of suspension but since this is undoubtedly company policy management has no alternative and I can understand the situation.

I feel that I performed my assigned tasks to the utmost of my capability and I trust that my work was satisfactory. I wish to take this opportunity to express my appreciation to both yourself and upper management for your diligence and cooperation during the time I was employed under your command. I apologize for any embarassment I may have caused you, the department, or the company. Once all the smoke has cleared it may someday be brought to light that I was a victim of circumstances. I sincerely hope that you will not hold my character in low esteem.

Please use this letter as my notice of resignation from the Northrop Corporation.

Please commence the proper paperwork to notify employee relations of my voluntary termination so that I may be paid for my contributions into the salaried savings program, also please notiy the credit union of my termination as I have some money in a savings account and I also have an outstanding loan balance which I would like to clear up.

Thank You.

Sincerely,
(Mr. Brown)

P.S. I hope that you will not be too harsh in your opinion of me in the near future should you be contacted by anyone as I am seeking employment with another firm. Please do not put too much faith in any rumors you may have heard concerning me as I amcertain there have been many.

RECEIVED OCT 5 1984 PURCHASING

EXHIBIT B2

B-3

TERMINATION CLEARANCE (7) (10)

Northrop Corporation NORTHRO

11-11-54

NAME (LAST, FIRST, INITIAL)	DIV.	LOC./DEPT.	SH	EMPL. NO.	P/R	SOC. SEC. NO.	EFFECTIVE DATE	EFF. TIME
<Mr. Brown>	71	M331	1		3		10-05-54	1542

CURRENT MAILING ADDRESS

JOB TITLE	SEX	LAST DAY WORKED	RATE
PROCUREMENT ADMIN	MALE	09-24-54	1[illegible]

FINAL CHECK ☒ PICKED UP ☐ MAILED

SENIORITY DATE 07-25-52

TYPE OF TERMINATION: ☐ QUIT ☐ LAYOFF ☐ RETIRED ☐ DISABILITY ☐ RELEASED ☐ DISCHARGED ☐ MILITARY ☐ DEATH

INTERCOMPANY ELEMENT TRANSFER ☐ TO

NOTE: NO ACTION REQUIRED BY SAVINGS PLAN ADMIN.

REASON FOR TERMINATION

ATTITUDE TOWARD JOB — Mr. <Brown> has been on temporary assignment pending a security investigation. F.B.I. inquiries. Though the specific query not known to E.E. it was confirmed that he was under investigation for questionable activities arising from his procurement position. Approximately two weeks after his dismissal he resigned in a letter of resignation.

WORKING CONDITIONS

PROPERLY REPRESENTED WHEN HIRED

WAGES SATISFACTORY

CHALLENGED IN JOB

PROGRESS

EVALUATION OF YOUR CONTRIBUTIONS

ATTITUDE TOWARD SUPERVISOR

FAIR AND IMPARTIAL TREATMENT

ADEQUATE DIRECTION AND INSTRUCTIONS

WORK ACKNOWLEDGED AND APPRECIATED

COMMUNICATIONS FROM SUPERVISOR

RESULTS OF SUPERVISOR

ATTITUDE TOWARD DEPARTMENT

COOPERATION WITHIN DEPARTMENT

GET ALONG WITH CO-WORKERS

EFFECTIVENESS OF DEPARTMENT

ATTITUDE TOWARD COMPANY

COMPANY FACILITIES

COMPANY POLICIES

COMMUNICATIONS TO EMPLOYEES

BENEFIT PROGRAMS

NEW EMPLOYER	JOB OFFERED	RATE OFFERED $

ADVANTAGES OF NEW JOB

SUGGESTIONS OFFERED

EXHIBIT 83

(9) INTERVIEWER'S COMMENTS

not for rehire

DATE OF INTERVIEW

INTERVIEWER R. H. Coe

EMPLOYEE RELATIONS COPY

B-4

Memorandum
Northrop Corporation

In reply refer to 8130-85-17

To M. D. Mroz

From Operations Audit

Subject PRELIMINARY FINDINGS - (Mr. Brown) INVESTIGATION

Date 05 December 1985

Copies T. E. Andersen

Ref

This status report intends to communicate to you the progress of our investigation into (Mr. Brown's) procurement activities.

We have received and completed our review of 43 procurement packages that he was responsible for. Our preliminary findings indicate:

- 47% of those Purchase Orders (POs) reviewed were not competitively bid, but were awarded on a single source basis.
- Of these single source decisions, of which 17 were valued over $1,000, 13 or 76.7% valued at over $102K did not receive any appropriate procurement management approval.

Of the remaining 23 POs that were bid, we noted:

- Three or 13% did not receive the required 3 competitive bids.
- In five cases (22%), the winning bids varied more than 20% from the second lowest bid received.
- 18 or 78% of the winning bids did not have evidence of date stamp on bid packages to confirm the date of receipt.

Additionally, we noted:

- In one case, a vendor was selected prior to their bid being evidenced that it was recieved.
- There was one instance where there were two POs soliciting similar goods and services. The bids on one PO were used in evaluating and awarding the decision for the second PO. The justification of not bidding the second PO was because the work was similar and bids on the first were sufficiently competitve.
- In five cases involving change orders, three did not have the same approval authority for the change orders as the original PO. In one case, the change order was for a larger value than the PO, yet the buyer approved a larger amount than his manager.
- We reviewed for physical evidence of courtesy bidding indicated by a "c" mark or other unexplained markings on bid packages. There was one case where there were handwritten marks or initials of an unknown significance on a bidder's package who was not the low bid.

NORTHROP

EXHIBIT 84

- In two cases where price analysis was required, evidence of such analysis was missing in one case and the analysis in the other consisted of a restatement of bid quotes.

- Finally, in one case, the winning bid package was missing from the package file.

We have also completed a review of this employee's business expenses incurred during his length of employment at ASD. Our preliminary observations are:

- Statement of business purpose and contacts are not normally required to support reimbursement of personal mileage costs.

- In 1983, over 70% of his mileage trips were to vendors who were awarded a PO. within a month of his trips. In contrast, in 1984 only 14% of his mileage trips were within a month of a contract being awarded to that vendor.

- There appeared to be three vendor's regularly visited. They were Certified Fabricators, Inc., Composites Horizon, and Amro Fabricators. During this employee's term of employment within the Division, the purchasing activity between the employee and these vendors was valued at between $120K and $340K.

We are contacting key members of the procurement and user community to further develop our findings. Our additional work should allow us to complete the review by December 20, as anticipated.

Clau

L. Lau
Operations Audit
B130/2A, Ext. 89362

B-5

August 1984

Gentlemen:

I am considering relocating my family to your area, and I am seeking employment with your firm. I have enclosed a copy of my resume listing my qualifications. I consider myself to be a self motivated, energetic individual, I am outgoing and cooperative with other people and require minimal supervision in performing my assigned tasks. I am in excellent health and have no medical problems. I have lived in California for the past 21 years and have grown weary of the smog, the heavy traffic, the fast pace of life and extreme pressures in this area. I am seeking a better way of life in an area which has not yet become a large bustling metropolis such as Los Angeles. Although the majority of my experience has been in the aircraft or aerospace related industry and I have made many advances in this field, I am willing to consider changing to other types of occupational areas. I feel that I would fit well and easily, adapt to any company willing to offer me an opportunity to prove myself. My present family consists of myself, my wife, and two sons age 22 and 13. All other children are married and on their own.

Please review the attached resume and if you are interested in a person of my caliber and qualifications, please contact me at your earliest convenience.

Additional information and references available on request.

Sincerely,

(Mr. Brown)

EXHIBIT B5

B-6

TELEPHONE REFERENCE CHECK

APPLICANT'S NAME Mr. Brown ____ 10/15/84 (Date) Bobbie Kiser (Interviewer's Name)

Name of Reference Gene Browne Tel. No. (213) 942-4186

Company or Affiliation Northrop Corp

Position SR. Buyer

1. How long have you known him/her? 10 years
2. What has been your work association? ____
3. Describe job or type of work he/she was doing? ____
4. Any particular strength or weakness applicant has: Is very thorough
5. How do you compare him/her to others within your organization? (Please circle)

   Average Above Average Sharp
6. How well does he/she work with others? Very well
7. Does he/she require much supervision? No
8. Why is he/she leaving (did he/she leave) this position? Get out of California
9. Do you have any reservations in recommending him/her for a job? No
10. Is he/she eligible for rehire? ____
11. Additional comments: Good management potential

EXHIBIT B6

Bobbie Kiser
Signature of Interviewer

TRW

B-7

TRW ELECTRONIC PRODUCTS INC.
3650 N. NEVADA AVE.
COLORADO SPRINGS, COLO. 80907

TO NORTHROP CORPORATION
8900 E. WASHINGTON BLVD
PICO RIVERA CALIF 90660-3737

ATTN.: PERSONNEL DEPT. ~~B-33~~ A12C/1B

OPEN ALONG THIS EDGE

(.RW ELECTRONIC PRODUCTS INC.
3650 N. NEVADA AVE.
COLORADO SPRINGS, COLO. 80907

NAME (used in your employment)
(Mr. Brown)

JOB TITLE	EMPL. FROM (DATE)	EMPL. TO (DATE)
PROC. ADMIN.	7-27-82	10-5-84
SOC SEC NO	REASON FOR LEAVING	
	QUIT. PERSONAL REASONS	

The above applicant has applied for a position with us. Your verification of service will be appreciated and kept confidential.

— TO BE FILLED OUT BY FORMER EMPLOYER —

Employed From _____ To _____
Job Title _____
Hr. Rate _____ Attendance _____
Eligible for Rehire _____
Reason for leaving _____
Remarks _____

RECEIVED
NOV 29 1984
Personnel Records

Does applicant belong to any subversive organization listed by the Attorney General's office to your knowledge?

Date _____ Signature _____

I hereby authorize the company or person named above to give any and all information regarding my employment, also any other information, whether personal or otherwise, that may or may not be on your records.

I hereby release you and your company from all liability for any damage whatsoever that may arise from furnishing same to TRW Electronic Products Inc.

Date 11/26/84 (Mr. Brown)
signature of Applicant

Detach along this edge and return in the reply envelope

Rev. 12/83
Form Copy

EXHIBIT B7

EXHIBIT 88

NORTHROP CORPORATION

EMPLOYMENT AND EARNINGS VERIFICATION DATA AS OF 12/04/84

THE MOST CURRENT TERM OF EMPLOYMENT, STRAIGHT TIME (BASED ON 40 HOUR WEEK-WEEKLY OR HOURLY) RATE AND YEAR TO DATE (YTD) EARNINGS ARE VERIFIED. WORK RATE COULD INCLUDE SUCH VARIABLE COMPENSATION AS COST OF LIVING, SHIFT BONUS, OVERSEAS BONUS, ETC. THESE VARIABLES ARE SUBJECT TO CHANGE WITHOUT NOTICE. GROSS YEAR TO DATE (YTD) EARNINGS COULD INCLUDE AN ANNUAL BONUS.

EMPLOYEE LAST NAME	EMPLOYEE FIRST NAME	M I	JOB CLASSIFICATION	BASE RATE	WORK RATE
<Brown>			E PROCUREMENT ADMIN	681.00	681.00

CURRENT GROSS YTD	SENIORITY DATE	TERM DATE
27747.42	07-26-82	10-05-84

J A Jankowski

MANAGER PERSONNEL RECORDS

B-8

TRW

B-9

TRW Electronic Products Inc.
3650 North Nevada Avenue
Colorado Springs, CO 80907

April 29, 1985

(Mr. Brown)

Dear Mr. (Brown)

An incident on April 23, 1985 has caused TRW Electronic Products, Inc. to take certain steps with regard to your employment. Your employment with TRW Electronic Products, Inc. is suspended as of April 24, 1985. During this suspension, you will be in a no-pay status. As a result of the incident, a legal investigation will be conducted in a timely manner. The results of the investigation will then determine if you are to be reinstated as an employee or if your employment is to be terminated. We will be in contact with you to keep you updated on your status.

Sincerely,

Earl J. Scharf
Personnel Manager

cc: Gary Rawson
William Snover

EXHIBIT B9

TRW

B-10

TRW Electronic Products Inc.
3850 North Nevada Avenue
Colorado Springs, CO 80907

August 21, 1985

<Mr. Brown>

Dear<Mr. Brown>

In view of the recent court decision you are hereby notified that your employment at TRW Electronic Products Inc. is terminated as of August 13, 1985.

Be advised that as of August 13, 1985 all benefits you were entitled to during your employment here ceased.

Earl J. Scharf

Earl J. Scharf
Human Relations Manager

EXHIBIT B10

PERSONNEL STATUS CHANGE

D-11

TYPE OF CHANGE (Check one): New Hire ☐ Termination ☒ Merit Review ☐ Transfer ☐ Other ☐

NAME (LAST, FIRST, MIDDLE INITIAL)	PAYROLL NUMBER	COST ACCOUNT NO	EFFECTIVE DATE (MONTH DAY YEAR)
(Mr. Brown)			8/13/85
SUPERVISOR'S NAME	COST CENTER		
	1422		

NEW HIRE OR REQUISITION DATA

(CHECK ONE)	(CHECK ONE)	(CHECK ONE)	POSITION TITLE
☐ New Hire	☐ Permanent Full Time	☐ Exempt	SR. BUYER
☐ Re-Hire	☐ Permanent Part Time	☐ Non-exempt	Grade7
☐ TRW Re-hire	☐ Temporary		SALARY $

STATUS CHANGES	MARK ALL APPROPRIATE BOXES	CHANGE FROM	CHANGE TO
Salary			
Promotion/Demotion (indicate job title)			
Grade			
Marital Status*			
Name*			
No. of Dependents*			
Transfer (indicate depts.)			
Reorganization (indicate depts.)			
Other			

* APPROVAL/INITIATED BY SIGNATURE _____ DATE _____

SEPARATIONS (Record forwarding address below)

(CHECK ONE) ESTIMATED DATE OF RETURN (MONTH, DAY, YEAR)

☐ Leave of Absence (explain type) _____ _____

TERMINATIONS

☐ Voluntary
XXX ☒ Involuntary (explain)
☐ Lay off
☐ Other (explain)

Comments regarding eligibility for re-hire (MUST BE COMPLETED)

_____
_____
_____
_____

FORWARDING ADDRESS STREET _____ CITY _____ STATE _____ ZIP CODE _____ EFFECTIVE DATE _____

OTHER CHANGES:

RECALL FROM LAY OFF ☐
RETURN FROM LEAVE ☐
REINSTATEMENT ☐

REMARKS OR REASON FOR ACTION

EEO

JOB CODE	GRADE	CAT GP ETH	HIRE DATE	BIRTH DATE	VET CODE
48		53	57	63	69

APPROVED:

INITIATING ORGANIZATION		ACCEPTING ORGANIZATION FOR TRANSFERS ONLY	
SUPERVISOR (SIGNATURE)	DATE	SUPERVISOR (SIGNATURE)	DATE
DEPARTMENT MANAGER (SIGNATURE)	DATE	DEPARTMENT MANAGER (SIGNATURE)	DATE
PERSONNEL (AUTHORIZED SIGNATURE)	DATE	OTHER	DATE

DISTRIBUTION: WHITE PERSONNEL FILE

EXHIBIT B11

"Mr. WHITE"

(Currently employed by Northrop Corporation)

Chronology

Northrop Corp. (California)

11/85	Suspected by Northrop of possible misconduct at Garrett
8/26/85	Hired

Garrett Airesearch Manufacturing Co. (California)

7/26/85	Laid off due to program termination
4/19/85	Became subject of FBI investigation
3/85	Became subject of Garrett investigation
12/1/58	Hired

DOCUMENT PACKET: MR. WHITE

GARRETT DOCUMENTS

Exhibit W1 — Employee Status Notice; document in Mr. White's personnel file at Garrett

Exhibit W2 — Letter from Garrett describing Mr. White's alleged kickback activities; document submitted in response to Congressional inquiry -- not taken from Mr. White's records at Garrett

NORTHROP DOCUMENTS

Exhibit W3 — Letter from Northrop describing the persons contacted in connection with its decision to hire Mr. White; document submitted in response to Congressional inquiry -- not taken from Mr. White's records at Northrop

W-1

EMPLOYEE STATUS NOTICE

7/26 Torrance

EMPLOYEE'S NAME: <Mr. White>
REQUISITION NO:
PERMANENT NO: 26962
BIRTH DATE:
SOCIAL SECURITY NO:
BENEFITS CODE: DENTAL: I.P.P.
CHANGE CODE: 62 EEOC: M-C
TYPE OF NOTICE: START ☐ STATUS CHANGE ☐ 90 DAY REVIEW ☐ TERMINATION ☒
CHECK REQUEST DATE:
EFFECTIVE DATE: 7/26/85

	FROM	TO
DEPT.	63850	
SHIFT	Days	
JOB TITLE / CODE	Admin Subcontract G-110-06 2E	☐ DIRECT ☐ INDIRECT

	BASE	COL	SHIFT BONUS	ACTUAL	BASE	COL	SHIFT BONUS	ACTUAL	AMT OF
RATE	3,625			3,625					

PERMANENT STATUS: ☐ YES ☐ NO

LEAVE OF ABSENCE - REASON:

DATES: FROM ____ TO ____ ____ WITH PAY ☐ ____ WITHOUT PAY ☐

REMARKS:

Hire date: 12/1/58
Reason: Layoff

SEPARATION - 240.0 HR 5019.12 GROSS 7/25/
PROBATION - 276.6 HR 5784.54 GROSS 7/23/

APPROVED	DEPT	DATE	EMPLOYEE	DATE
[signature]	63	7/26/85		
[signature]	76	7/26/85	MEDICAL STATUS	
			PERSONNEL	
John T. Metza	63950	7/24/85	PERSONNEL [signature]	95-0 7/24/

TO BE COMPLETED FOR TERMINATIONS ONLY

I have delivered to my supervisor or to other authorized persons all items belonging to the GARRETT CORPORATION.

SUPERVISOR'S CHECK LIST

- ☒ BOOKS OR MANUALS
- ☒ CO. EQUIPMENT OR PAPERS
- ☒ EXPENSE—ADVANCES & TICKETS
- ☒ ENGINEERING LIBRARY
- ☒ CREDIT CARDS
- ☒ AIR TRAVEL CARD
- ☒ INSPECTION CRIB
- ☒ KEYS
- ☒ LAB STORES
- ☒ SAFETY EQUIPMENT
- ☒ UNIFORMS
- ☒ TOOL CRIB
- ☒ CLASSIFIED DATA

PERSONNEL CHECK LIST

- ☒ EMPLOYEE STORES
- ☒ PETTY CASH LOAN
- ☒ SAVINGS PLAN
- ☒ SEVERANCE SIGNED
- ☒ I.D. CARD
- ☒ PAGER
- ☒ BANK LOAN

CONFIDENTIAL INFORMATION AND INVENTION AGREEMENT:
I read and executed the confidential information and invention agreement at time of hire. I understand its requirements and acknowledge that it remains in effect after termination.

LIFE INSURANCE AND HEALTH CARE PLAN
I acknowledge receipt of notification that I am entitled to convert my Group Life Insurance and Garrett Health Care Plan.

CERTIFICATION:
I certify that the above information is correct to the best of my knowledge and belief.

EMPLOYEE: (SIGNATURE) <Mr. White> WITNESS: (SIGNATURE) [signature] 004

CHANGE CODES

STARTS
11. NEW HIRE
12. REHIRE
13. REINSTATE
14. DIV. TRANSFER-IN
15. NAME CHANGE
16. MILITARY REINSTATEMENT
17. TEMPORARY HIRE
18. PART TIME

TRANSFER
21. CO. REQUEST
22. EMP. REQUEST
23. MEDICAL
24. RETURN LEAVE

RATE CHANGE
31. MERIT
32. PROMOTION

CLASS CHANGE
40. CLASS CHANGE
41. CODE CHANGE
42. JOB RESTUDY

LEAVE
51. MEDICAL WITHOUT PAY
52. MEDICAL WITH PAY
53. PERSONAL WITHOUT PAY

TERMINATION
61. RESIGNATION
62. LAYOFF
63. DISCHARGE
64. MEDICAL
65. RETIREMENT
66. MILITARY
67. PROBATIONARY
68. DEATH
69. DIV. TRANSFER—OUT TEMPORARY TERM.

DIRECTION CORRECTION

EEOC CODES
C. CAUCASIAN
B. BLACK
A. ASIAN
I. AMERICAN INDIAN
S. HISPANIC
H. HANDICAPPED

DISTRIBUTION:
WHITE – PERSONNEL
YELLOW – PAYROLL
BLUE – DEPARTMENT
PINK – INDIVIDUAL
GREEN – DEPARTMENT

FORM 1230 (5-8)

EXHIBIT M1

EXIT INTERVIEW RESULTS

1. Did employee comment on the following:

	Yes	No	Specific Comments:
Pay and Benefits	☐	☐	
Working Conditions	☐	☐	
Supervision	☐	☐	
Training and Opportunities	☐	☐	
Job Placement	☐	☐	

General Attitude toward Job and Company: Good

2. What additional information concerning termination from department:

3. What do you think was the real reason for termination? Layoff - shutdown of Centrifuge Program

4. Do you think employee is eligible for unemployment insurance? Yes ☒ No ☐

Reasons:

5. Should this employee receive favorable consideration for rehire? Yes ☒ No ☐

If no, state reasons:

L.U.

Interviewer

7/29 19

Date

W-2

LAW OFFICES
McKENNA, CONNER & CUNEO
1575 EYE STREET, N. W.
WASHINGTON, D. C. 20005
(202) 789-7800
CABLE ADDRESS: MCKEMCONN WASHDC
TELEX (TWX) 710-822-0149
TELECOPIER (202) 789-7804

LOS ANGELES
TWENTY-EIGHTH FLOOR
3435 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90010
(213) 738-1400

SAN FRANCISCO
TWENTY-SEVENTH FLOOR
STEUART STREET TOWER
ONE MARKET PLAZA
SAN FRANCISCO, CALIFORNIA 94105
(415) 543-0204

ORANGE COUNTY
NINTH FLOOR
611 ANTON BOULEVARD
COSTA MESA, CALIFORNIA 92626
(714) 751-3800

MICHAEL G. SCHEININGER
DIRECT DIAL (202) 789-

May 2, 1986

HAND DELIVERED

The Honorable William S. Cohen
United States Senate
Committee on Governmental Affairs
Subcommittee on Oversight of
Government Management
Washington, D.C. 20510

The Honorable Carl Levin
United States Senate
Committee on Governmental Affairs
Subcommittee on Oversight of
Government Management
Washington, D.C. 20510

Attention: Ms. Elise Bean, Esq.
Minority Chief Counsel
Room 446

Re: Subpoena to Garrett Corporation

Dear Senator Cohen and Senator Levin:

* * *

7. You have inquired whether the employees resigned or were fired and the reason for the resignation or termination:

(a) According to the Employee Status Notice, <Mr. White> was terminated by layoff because of a shut down of the _____ program on which <Mr. White> was employed.

(b) According to the Employee Status Notice, Mr. was terminated by layoff.

8. You have inquired whether the Garrett Corporation suspected the named employees of engaging in kickbacks, conflicts of interest, or related misconduct and, if so, the nature of this activity:

(a) In March, 1985, it came to the attention of Garrett that <Mr. White> may have been receiving hotel accommodations and other items and services from a vendor. Accordingly, under the direction of its counsel, Garrett engaged the services of a private investigator beginning

EXHIBIT W2

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March 29, 1985. However, before this investigation could develop any hard evidence, another vendor approached Garrett and alleged criminal wrongdoing in the purchasing department at the Garrett division known as AiResearch Manufacturing Company (AMC). That vendor provided Garrett with two audio tapes which had been made in December 1982 and February 1983. These tapes specifically implicated <Mr. White> in kickbacks and other unethical practices. On April 19, 1985, all information gathered by Garrett to date was turned over to the FBI, and Garrett pledged full cooperation with the FBI in their conduct of the investigation. It was agreed with the FBI that Garrett would cease its internal investigation. Between April and September 1985, the FBI pursued the case, at first covertly and later overtly. <Mr. White> the implicated AMC Buyer in Department ... was laid off However, since the FBI was at that time still conducting its covert investigation, and since the company had not completed its own investigation of <Mr. White> , Garrett could not discharge him for cause.

According to one of the audio tapes provided to Garrett, <Mr. White> was implicated in the following: (1) feeding pricing information to C (2) being paid by C one-half of its markup, (3) asking C for a payment (kickback) up front, (4) being given a $700 to $800 wedding present by A (5) being paid 5% on orders placed in March 1983 with A and (6) inferences of conspiracy with T . In addition, the company-initiated investigation determined that <Mr. White> (7) attended , 1985 with V , which paid the bill. Further, a sworn statement by another employee implicated <Mr. White> in the following: (8) receiving 5% and 10% kickbacks from C (9) using condominiums belonging to S (10) using condominiums belonging to N and A and (11) being paid kickbacks from vendors, specifically C E , A C , T , F , plus others.

(b) The internal investigation carried out by Garrett Corporation between April and November 1985 at AMC and AID did not produce any allegations or suspicion of Mr. Garrett accordingly has no information relating to any alleged

LAW OFFICES
McKENNA, CONNER & CUNEO

kickbacks, conflicts of interest, or related misconduct associated with Mr. .

9. You have asked whether any prospective employer has asked Garrett for a job reference for either employee and the response Garrett has made to such inquiries:

(a) Garrett has no record of any prospective employer inquiring about <Mr. White> .

(b) Garrett also has no record of any inquiry made by a prospective employer about .

10. You have asked for our information on the employees' subsequent employers:

Garrett understands that <Mr. White> was subsequently employed by Northop, but Garrett has no records in its files relating to this. Garrett has no information on Mr. subsequent employers, if any.

The Subcommittee subpoena also asks for copies of the actual documents relating to these employees. I understand from Ms. Bean of the Subcommittee staff, however, that your concerns would be fully addressed by the answers we have provided above, the employees' resumes and/or job applications, and personnel actions and performance evaluations for only the past five (5) years for <Mr. White> , and all relevent information for Mr. .

In accordance with the assurances provided in your April 15 letter, we expect that this information and subpoened company records will be given the full confidentiality normally accorded personnel records.

Very truly yours,

McKENNA, CONNER & CUNEO

By Michael G. Scheininger
Counsel for Garrett Corporation

Attachments

Mr. White

Northrop Answers to Questions Directed in Subpoena dated 4/29/86:

1. EMPLOYEE NAME: Mr. White

2. PRIOR EMPLOYER: Airesearch Mfg. Co. - 2525 W. 190th St., Torrance, CA (Dec. 1958 - July 1985)

3. EMPLOYMENT DATE: August 26, 1985

4. JOB QUALIFICATIONS/CONTACTS PRIOR TO EMPLOYMENT: Upon considering Mr. White for employment, his former supervisor Mike Torres was contacted regarding job performance and reasons for lay-off. Two Northrop employees formerly employed by Airesearch Mfg. Co. were also contacted for character references. Mr. White was given high points for character and his lay-off was due to program termination. Based on these references and 27 years experience, Mr. White was considered a good candidate for employment.

DOCUMENTATION: Questions 5, 6, and 7 of the ATTACHMENT TO SUBPOENA request various documents concerning Mr. White employment at Northrop. All such documents known to the Corporation at this time are included in the attached binder.

EXHIBIT W3

G-1

TO WHOM IT MAY CONCERN:

I hereby authorize you to release to Rockwell International Corporation any and all records of my services/ education and to release any other information concerning me, whether personal or otherwise.

Furthermore, I hereby release your organization from all liability for any damage which might result from furnishing said information.

(Mr. Grey)
SIGNATURE

DATE: 5-8-84

WITNESS

FORM [illegible] REV. 5-81

We are considering the person identified below for a position [illegible] States Government, will require access to information which must be safeguarded in the interests of national security.

Name: (Mr. Grey) Maiden Name:

Also Known As:

Social Security No. At the time of applying for employment this person indicated having been in your employ from: 03/81 to 04/84

In order to verify and evaluate this individual's employment record, we would appreciate your furnishing us the information requested below. A postage-paid, return addressed envelope is enclosed for your convenience.

Please accept our sincere thanks for your cooperation.

Very truly yours,

Rockwell International Corporation

R. H. Beatty
Director, Industrial Security

*COMMENTS

Hire Date: 5/26/81 Termination Date: 4/3/84 Position Buy/Discont Adm Salary $2623
Was the applicant ever subject to disciplinary action?
Did the applicant ever use alcoholic liquors on the job?
Were the applicant's wages ever attached?
Was the applicant excessively absent from work? N/A
Was the applicant's production and work record satisfactory?
Did the applicant react favorably to the direction of supervision?
Do you have any reason to question this person's loyalty to the United States?
Reason for leaving your employ
Is the applicant eligible for rehire? YES
If not, please give reason

00036

Date 5/9/84 Signed Terri Corpuz Position Personnel Records

* PLEASE PLACE ADDITIONAL COMMENTS, IF ANY, ON THE REVERSE SIDE

Defamation and Employer Privilege

D. Jan Duffy*

Developments in the area of employee rights have forced employers to take a closer look at their policies regarding information gathering and dissemination. A growing awareness of the employee's right to privacy, for example, has sensitized employers and made them more cautious about the types of information they will pass on within their companies and to outsiders. Information passed on to the wrong party or for the wrong reason poses the risk of defamation liability. Most employer communications have traditionally been protected from defamation liability under the doctrine of privilege. Where the privilege is abused, vulnerability to lawsuits increases. In the following article, the author examines the legal theory governing employer protection against defamation liability and the current status of that protection.

Introduction

Employers collect significant amounts of information about their employees, and, until recently, passed it on rather freely to prospective employers, credit bureaus, government agencies, and others who asked. Now, however, coached by their attorneys, most employers have become reluctant to divulge anything about employees beyond the industrial equivalent of name, rank, and serial number.

The primary reason for the change is employer fear of defamation lawsuits. Defamation is hardly a new cause of action; however, the employee rights explosion of the last several years has fostered new sensitivity and focused new attention on such traditional torts as defamation for remedying work-place complaints.

Defamation is the communication of a falsehood that injures another's reputation. If the defamation is written or fixed in a tangible form such as film, it is called *libel*; if it is oral or made by a transitory gesture, it is called *slander*.

Defamation in either form can occur in the work place whenever an employer transfers information about an employee.

* J.D., Case Western Reserve University. Ms. Duffy is an associate professor of business and labor law at the School of Business, California Polytechnic State University, San Luis Obispo, California. She is also of counsel to Sinsheimer, Schiebelhut & Baggett in San Luis Obispo.

Most commonly, it happens when a prior employer provides reference information to a prospective employer. It can also occur, however, in such diverse and seemingly innocent contexts as performance evaluations, investigations of employee misconduct, and grievance proceedings.

Given the number of information transfers that employers make, occasions for incurring liability abound. Since defamers are liable for compensatory and sometimes punitive damages, the emerging employer defensiveness is not surprising. Nevertheless, newly sensitized employers who have cut back or altogether eliminated valuable information transfers may have overreacted. The law has traditionally offered substantial protection from defamation liability to recognizedly important information transfers, and most employer communications have qualified for such protection. Thus, unless the current attention to employee rights alters the law of defamation, fear of defamation liability should not eliminate or obstruct vital information flows. The purpose of this article, then, is to examine the protection afforded employers by traditional legal theory and to determine the current status of that protection.

Privilege

The doctrine that has long provided employers protection from defamation liability is called *privilege*. The law recognizes that in some circumstances the benefits of a free flow of information outweigh the harm that may arise from defamation. Consequently, information transfers in such circumstances are free, or nearly free, from the threat of defamation liability. One who communicates information in one of the recognized situations is thus considered "privileged" to defame; that is, he or she cannot be held liable for defamation even though the communication is false and injurious.

Privileges are of two types: *absolute* and *qualified* or *conditional*. Absolute privilege is conferred where society's interest in the free flow of information is so strong that communicators are granted total immunity from defamation liability. Communications of legislators, for example, or those of judges and witnesses in judicial proceedings are protected in this way.

Some courts have also recognized absolute privilege where the victim of the defamation has consented to the allegedly

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defamatory communication being made. Consent could be found, for example, where an employee made an issue at a grievance hearing of the justification for his termination. The employer who then stated its justification would not be liable for defamation, even though its statements were false and injurious, and even though the employer acted with bad motives.

Qualified privilege, on the other hand, is granted where society's interest in encouraging information transfers is strong but not strong enough to protect the individual who defames out of highly improper motives or in a particularly egregious way. In such situations, protection from liability for false, injurious communication is extended but will be withdrawn if the privilege is "abused."

One formulation of qualified privilege is as follows: a communication is made by "one who has an interest in the subject matter of the communication, or in respect to which he has a duty, to a recipient who has a similar interest or duty." A somewhat more helpful definition is the breakdown provided by *The Restatement (2nd) of Torts*, sections 594, 595, 596, and 598 (1977). In that formulation, privileged occasions include those where communication is made: (1) to protect the publisher's legitimate interest; (2) to protect the recipient's or a third party's legitimate interest; (3) where the parties have a common interest in the subject matter; or (4) where the communication is to a public official on a matter of public interest.

Most employer communications concerning employees fall within one of the above qualified privilege categories. References from a prior employer to a prospective employer, for example, ordinarily have been held to come within the "legitimate interest of the recipient" privilege. Since employers must decide whether to hire an applicant—sometimes in preference to another applicant—courts reason that they need information to make a valid decision and that the law must encourage such information transfers. Some courts have even held such communication to fall within the category of the communicator's interest. An employer must give out such information, the reasoning goes, to obtain similar information itself when the need arises.

Communication of information about an employee's performance, at least when the communication is between his or her supervisors or between supervisors and the personnel department, has been deemed privileged not only on the first two grounds, but also as "communication concerning a common interest to one who shares the interest." Employers' communications concerning employees' misconduct to law enforcement or other government agencies have been held justified by the "public interest" type of qualified privilege.

Abuse of Privilege

A qualified privilege may be lost if it is "abused." The law is neither clear nor consistent on what constitutes an abuse of privilege. Simplifying to some degree, however, a qualified privilege may be withdrawn if the communicator has acted with: (1) traditional or common-law malice; (2) actual malice; (3) excessive publication; or (4) excessive language.

Common-law malice is a particularly murky concept. In its pure form, communicating with common-law malice means communicating with spite or ill will. An employer who disliked an employee or who had had an argument with her or him, and subsequently gave false, injurious reference information in order to prevent the employee from getting a new job, obviously would be acting with common-law malice.

Courts and commentators muddied the waters of common-law malice, however, by also inferring malice from unreasonable conduct on the part of the defendant, even when that conduct was not based on actual spite or ill will. Behavior deemed to give rise to inferred malice included everything from the defendant's communicating with knowledge that the communication was false (i.e., a high degree of fault) to the defendant's communicating "without reasonable grounds to believe his statement is true" (i.e., with fault often amounting to no more than negligence).

In 1974, however, the U.S. Supreme Court decided *Gertz v. Welch*, 418 U.S. 323 (1974). That landmark case resulted in the demise of inferred malice, at least to the extent that it was based on unreasonable conduct amounting only to negligence. In *Gertz*, the Court declared that defamers of private persons could not constitutionally be held to have committed defamation unless they were guilty of fault at least amounting to negligence. After that decision, it was clearly incongruous to hold that persons communicating in situations long recognized as

specially privileged could abuse the privilege, lose its protection, and thus be held liable for defamation for inferred malice based on nothing more than negligence. Accordingly, most courts and commentators dropped the loose concept of inferred malice as an abuse of privilege.[1] They replaced it with common-law malice, used in its pure sense of spite or ill will, and a concept the Supreme Court termed "actual malice."

Actual malice is not really "actual" malice at all. Rather, it is inferred malice, but it is inferred only from situations where the communicator either knew the communication was false or acted in reckless disregard of its truth or falsity. Thus, abuse of privilege by actual malice is different from the old abuse by common-law inferred malice because mere negligence will not overcome the privilege.

Privilege can also be abused by *excessive publication*. Publication simply means "communication." "Excessive" can be understood in either of two ways: (1) by an excessive means such as a broadcast media; or (2) to an excessive number of persons, that is, to persons who had no need to know the information. For an employer to post an employee's discharge notice on the employee's locker instead of giving it to her or him privately would be excessive publication in the former sense; to make statements concerning an employee's misconduct to persons who had no connection with the business would be excessive publication in the latter sense. To publish the reason for an employee's termination in a company newspaper likely would be excessive publication in either sense.

A communicator also may lose a qualified privilege by *excessive language*, that is, by communicating too much or by using vituperative language. To include non-work-related information or racial or ethnic epithets in reference information otherwise privileged, for example, would be to lose the privilege under traditional law.

Current Status of Employer Privilege

Examination of the employment-related defamation cases reported in the last several years provides insight into the current status of employer privilege. Although the decisions are not entirely in accord, they reveal a number of consistent threads

of opinion. The results are organized below in terms of important, typical employer communications.

Reference Information

Despite increasing employer caution, references to prospective employers remain among the most common employer transfers of employee information. For that reason, and because communication of negative information in that context creates particularly significant repercussions, employer reference communications remain a fertile source of defamation lawsuits.

References also continue to be a particular target for reform; numerous lawmakers and commentators have singled them out as a particular infringement on employee rights.[2] One court, in fact, withdrew the traditional privilege accorded employer references. In *Harrison v. Arrow Metal Products Corp.*, 20 Mich. App. 590, 174 N.W.2d 875 (1969), an employee was falsely accused of theft and discharged. His employer subsequently responded to reference requests with the information that the employee had been fired for theft. In holding that the employer's communications to prospective employers were not protected by any privilege, the court considered the serious effect of the accusation on the employee and the burden upon him of proving his innocence; however, the court did not appear to consider the traditional basis of privilege for such communications, that is, the employer's or society's interest in reference communications. (Presiding Judge Gillis, dissenting, argued that a prospective employer's interest in not hiring thieves justified retention of the traditionally recognized privilege for employment references. He pointed out that the same result could be reached by finding that the privilege existed, but that it had been abused and its protection withdrawn on the facts presented.)

The rule of *Harrison* was never followed by other courts, however, and in very recent cases, the privilege accorded employer references remains as strong as ever. As the court noted in *Arsenault v. Allegheny Airlines, Inc.*, 485 F. Supp. 1373 (D. Mass. 1980), *aff'd*, 636 F.2d 1199, *cert. denied*, 454 U.S. 821 (1981): "... the general rule in defamation actions involving an employer's remarks about an employee's work record is that

performance to a person in authority do not constitute communication at all and thus cannot support a charge of defamation. [*See, e.g., Monahan v. Sims*, 163 Ga. App. 354, 294 S.E.2d 548 (1982).] The more common view, however, is that such communications *are* communications, but are qualifiedly privileged.[5]

Communications to Other Employees

Defamation lawsuits are frequently based on employer communications to employees providing information on a co-worker's misconduct, for example, or the reason for his or her discharge. Although many courts have extended privilege to these employer communications, particularly when their purpose is to improve employee morale or to instruct other employees to refrain from similar misconduct, the view is not unanimous.

In 1964, for example, the Michigan Appeals Court in *Sias v. General Motors*, 372 Mich. 542, 127 N.W.2d 357 (1964), withdrew recognition of employer privilege to communicate information to nonsupervisory employees. The employer in this case had made allegations of an employee's theft to his co-workers on the basis of very little proof. The court held that the defendant's interest in "restoring morale" was not sufficient to confer a privilege on such communication to employees who were not supervisors, personnel department representatives, or company officials. At least one other court explicitly followed the Michigan court's rule. [*See Drennan v. Westinghouse Electric Corp.*, 328 So.2d 52 (Fla. App. 1976).]

Other courts have continued to recognize an employer's qualified privilege to inform employees of a co-worker's misconduct. For example, in *Jones v. J. C. Penney Co.*, 297 S.E.2d 339 (Ga. App. 1982), an employer told its employees about a co-worker's misconduct in order to let them know that they themselves had been exonerated. The court found the employer's defamation to be privileged.

Nevertheless, because courts view with some suspicion defamatory communications to an employee's co-workers, employers must exercise great care to avoid abusing the privilege. Certainly, they must avoid communicating to co-workers impulsive or spontaneous pronouncements concerning an employee. Such communications have never been considered privileged and are not considered privileged now. In *Dillard Department Stores v. Felton*, 634 S.W.2d 135 (Ark. 1982), an employer communicated the reason for an employee's discharge to the employee's supervisor, to the unemployment compensation office, and to the employee's wife. The court found these communications privileged. However, the court held that a supervisor's impulsive communication of the same information to a group of employees standing outside his office was not privileged.

Communications in the Course of Investigations

To properly investigate apparent employee misconduct, it is often necessary for employers to divulge employee information to others. Courts continue to recognize the traditional privilege for these communications. In *Gaines v. CUNA Mutual Insurance Society*, 681 F.2d 982 (5th Cir. 1982), for example, the court held that defamatory allegations communicated between officers of the defendant company, which were also seen by their secretaries, were privileged. The circumstances created a genuine business need to make an investigation, the court said, the communications were privileged because of the public policy that recognizes the need for the free communication of information to protect business and personal interests. [See also *Williams v. Taylor*, *supra*.]

Conclusion

In summary, examination of recent defamation cases reveals no significant alteration of the doctrine of employer privilege in the last several years. Despite the employee rights revolution, courts continue to recognize the employer's privilege to communicate information that may defame employees. Employers thus continue to enjoy substantial protection from defamation liability for their important work-place communications concerning employees.

Nevertheless, employers must not discount recent employee rights developments altogether. The majority of employer privileges have always been subject to withdrawal for abuse. Doubtless, employees' new awareness will foster increased attention to employer conduct in connection with information transfers and thus increase the possibility of litigation. Moreover, greater judicial sensitivity to employee issues will certainly cause closer scrutiny of employers' actions and perhaps even a lowered tolerance for abuse of privilege. Accordingly, employers must become familiar with the concept of privilege and its limits. They also must remain vigilant for potential defamation problems in their own information-handling practices.

such comments are conditionally privileged and are actionable only upon the proof of actual malice."[3]

Communications to Employee Representatives

Another source of defamation lawsuits is employer communications to employee representatives or unions. Courts have traditionally recognized a privilege for communications made during grievance proceedings, and that recognition continues today. [See, e.g., *General Motors Corp. v. Mendicki*, 367 F.2d 66 (10th Cir. 1966); and *Hasten v. Phillips*, 640 F.2d 274 (10th Cir. 1981).] The privilege extends not only to formal grievance hearings, but also to contractually required notices of discharge and relatively informal meetings for purposes of adjusting employer/employee problems. [See, e.g., *Joftes v. Kaufman*, 324 F. Supp. 660 (D.C. Col. 1971); *Hasten v. Phillips*, *supra*; and *Brooks v. Solomon Co.*, 542 F. Supp. 1229 (N.D. Ala. 1982).]

Employers should not assume that any comment made about an employee to his or her union will be privileged, however. Courts have refused to extend a privilege where the communication occurred in a casual or nonofficial context. In *Neece v. Kantu*, 507 P.2d 447 (N.M. App. 1973), *cert. denied sub nom. Ritschel v. Neece*, 507 P.2d 443 (1973), for example, an employee sued an employer for defamation arising in part from the employer's letter summarizing an early step of a multistep grievance procedure. The court held that the letter was absolutely privileged as part of the grievance procedure. The employee also claimed that he was defamed in a conversation that took place between him, his supervisor, and his shop steward in the company parking lot. That conversation, the court ruled, was merely preliminary investigation on the employer's part and could not qualify for absolute privilege protection. Thus, while employers are largely protected from defamation liability in their official communications with employee representatives, they should exercise caution in dealing with them on a casual basis.

Communications to Outsiders

Privilege is also frequently extended to employer communications to certain outsiders such as government agencies and law enforcement officials. A number of defamation suits have arisen, for example, from information concerning employee misconduct that employers communicated to unemployment compensation agencies. Some courts have found the privilege in such communications to be based on common law; others on statute. The privilege is sometimes considered absolute, sometimes qualified. In any event, courts in the past have unanimously held that such communications are privileged to some degree, and they continue to do so today.[4]

Employer communications to law enforcement agencies are also ordinarily deemed privileged. As the court stated in *Williams v. Taylor*, 129 Cal. App. 3d 745, 181 Cal. Rptr. 423 (1982): "There must be an open channel of communication by which citizens can call attention to suspected wrongdoing. That channel would quickly close if its use subjected the user to a risk of liability for libel. . . . Thus, the absolute privilege is essential." [See also *Young Oil Co. of La., Inc. v. Durbin*, 412 So.2d 620 (La. App. 1982).]

Communications to credit agencies, whether by employers or others, have come under increasing scrutiny in recent years. Generally, they remain a qualified privilege, but because they are regarded with some suspicion, employers must guard carefully against loss of the privilege due to abuse. For example, in *Snodgrass v. Headco Industries*, 640 S.W.2d 147 (Mo. App. 1982), an employer asserted to a loan agency that a former employee was discharged for falsifying company information and theft. In fact, the employee had resigned and gone to work for a competitor. The court held that the employer was not protected by a privilege as the information was not solicited and the loan company, unlike a prospective employer, had no "significant interest" in the information.

Communications to Supervisors or Others with Responsibility for Employee Performance

Performance evaluations, disciplinary actions, and discharge notices are but a few of the types of information regularly exchanged between supervisors and their superiors or the personnel department. The privilege long recognized for these important communications continues in effect today. Some courts have held that communications concerning employee job